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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

— — —

THE HONORABLE GEORGE C. HANKS, JR., JUDGE PRESIDING

USA, No. 4:21-CR-00009-1

Plaintiff,

vs.

ROBERT T. BROCKMAN,

Defendant.

COMPETENCY HEARING -- DAY 4 AM SESSION

OFFICIAL REPORTER'S TRANSCRIPT OF PROCEEDINGS

Houston, Texas

THURSDAY, NOVEMBER 18, 2021

APPEARANCES:

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CHRISTOPHER MAGNANI, DOJ

LEE F. LANGSTON, DOJ

BORIS BOURGET, DOJ

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PROCEEDINGS

(The following proceedings held in open court.)

* * *

THURSDAY, NOVEMBER 18, 2021 -- 8:49 A.M.

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THE COURT: Morning, everyone and welcome back. We can stay late tonight. Like previously, I don't have anything going on this evening, so just budget on staying until about six o'clock tonight for your witness purposes.

Yesterday before we got started we talked about Dr. Yudofsky and his juggling. Were you able to juggle things around? I'm not putting pressure on you, but I know there --

MR. LANGSTON: We're happy to call him first.

THE COURT: Okay. Great.

MR. LANGSTON: Judge, before we get to Dr. Yudofsky, I think there's an issue involving counsel from Locke Lord that we may want to resolve.

THE COURT: Okay.

MR. LOONAM: We have a small issue, too, Your Honor.

THE COURT: Let's go ahead and take

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08:50:04 1 those up then.

08:50:05 2 MR. LOONAM: Sure, Your Honor. My
08:50:07 3 colleague, Irina Bleustein, has an issue to raise
08:50:10 4 with the Court.

08:50:11 5 THE COURT: Okay. Sure.

08:50:13 6 MS. BLEUSTEIN: Good morning, Your
08:50:13 7 Honor. Irina Bleustein on behalf of Mr. Brockman.
08:50:16 8 Just a minor housekeeping note. Two different
08:50:19 9 Defense Exhibits were marked for identification
08:50:21 10 only, but they were referred to as DX-52. And to
08:50:24 11 clear up the record, the article entitled
08:50:27 12 "Neuroimaging in Parkinson's Disease Dementia
08:50:30 13 Connecting the Dots" is marked for identification as
08:50:32 14 DX-52. And the volumetric analysis demonstrative is
08:50:37 15 marked as DX-58, and both of these documents have
08:50:40 16 been shared with the Government with corrected
08:50:42 17 stickers.

08:50:43 18 THE COURT: Okay. Great. Thank you.
08:50:44 19 The record will stand clarified.

08:50:58 20 Good morning.

08:50:59 21 MR. JOHNSON: Tim Johnson for UCSH and
08:51:03 22 for Reynolds and Reynolds.

08:51:04 23 THE COURT: Welcome.

08:51:05 24 MR. JOHNSON: It's not so much our
08:51:06 25 issue. I believe it's the Government's issue.

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08:51:08 1 They've taken the first shot, so we'll stand back
08:51:10 2 and let them address the issues they have with the
08:51:13 3 Court we think are very minimal. To the extent
08:51:15 4 they're not, we apologize for taking your time this
08:51:18 5 morning. I know from all accounts you are pretty
08:51:21 6 busy here.

08:51:21 7 THE COURT: It's been a busy week.

08:51:24 8 MR. LANGSTON: So, Your Honor, I think
08:51:25 9 we started previewing this for the Court earlier,
08:51:29 10 but the issue is we sent a subpoena to Reynolds and
08:51:32 11 Reynolds for e-mails between Tommy Barris, who is
08:51:37 12 one of the Government's witnesses here and Reverend
08:51:42 13 Jackson, who is going to be one of the Defense
08:51:44 14 witnesses. They're two of the board members of
08:51:45 15 Reynolds and Reynolds.

08:51:46 16 On Friday, we received a production
08:51:49 17 that included 304 e-mails, I think. Not included in
08:51:56 18 that was an e-mail that we received on Monday, and
08:52:00 19 I'll hand it up to the Court because I think it will
08:52:03 20 sort of express why we are concerned about this.

08:52:07 21 THE COURT: Okay.

08:52:17 22 MR. LANGSTON: And so, this is
08:52:19 23 Mr. Jackson writing to Mr. Barris about an interview
08:52:22 24 by IRS agents associated with this case. And in
08:52:25 25 that he says that he was purposefully evasive and

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08:52:30 1 uncertain with the agents, and that he wanted to
08:52:34 2 make sure -- or he said that nothing he said could
08:52:38 3 have deepened Bob's problems and added problems.

08:52:42 4 The e-mail itself is what it is.
08:52:45 5 Our concern is that it was not included in the
08:52:49 6 original production.

08:52:52 7 THE COURT: It's -- on the Reynolds and
08:52:56 8 Reynolds server. That's clear.

08:53:01 9 MR. LANGSTON: Your Honor, that's one
08:53:02 10 of the tricky things here. So Reynolds and Reynolds
08:53:04 11 has kind of an unusual e-mail system. For every
08:53:06 12 rank and file employee, it is stored on a central
08:53:10 13 server, you know, sort of as you would expect. For
08:53:13 14 the top however many executives, including
08:53:16 15 Mr. Barris and Mr. Jackson, what happens is when
08:53:19 16 they -- when their computer downloads from the
08:53:23 17 server, it's then deleted from the server. So the
08:53:25 18 only place the e-mail resides is on that person's
08:53:27 19 computer.

08:53:28 20 THE COURT: Okay.

08:53:30 21 MR. LANGSTON: If that executive
08:53:31 22 deletes the e-mail, it's gone. Our understanding of
08:53:36 23 how this was produced is they did a scan of
08:53:38 24 Mr. Barris's computer, and this e-mail was no longer
08:53:42 25 on the computer. So obviously we have some concerns

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08:53:45 1 about why it's not.

08:53:46 2 Mr. Barris has been under a
08:53:48 3 litigation hold for years, so it should be there.
08:53:55 4 And the second e-mail -- I will say, Your Honor, the
08:53:57 5 -- you know, the second production of this e-mail
08:54:00 6 was just this e-mail. And we know that Reynolds got
08:54:05 7 a specific inquiry about this e-mail over the
08:54:08 8 weekend that was basically, like, "If you don't turn
08:54:11 9 this over to the Government, Government's gonna get
08:54:14 10 it another way."

08:54:14 11 So our concern is this: --

08:54:16 12 THE COURT: Well, where did this come
08:54:18 13 from?

08:54:18 14 MR. LANGSTON: So, it was eventually
08:54:21 15 produced by UCSH, and I think there are -- look,
08:54:26 16 this is what we're trying to figure out. What we've
08:54:28 17 heard from counsel is they were always intending to
08:54:31 18 produce it. It was floating around somewhere, but
08:54:33 19 it didn't come from Mr. Barris's computer. Again,
08:54:37 20 we have reason to believe that may not be the case
08:54:39 21 intent to produce it, certainly.

08:54:41 22 And so -- look, we want to make
08:54:44 23 sure there were not other e-mails deleted similar to
08:54:47 24 this. Obviously it bears on the bias and veracity
08:54:51 25 of Mr. Jackson and Mr. Barris. So we've asked them

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08:54:55 1 for three things to help resolve this. We've asked
08:54:58 2 for a witness who can explain the circumstances
08:54:59 3 behind this production and why this was not included
08:55:03 4 on Friday.

08:55:04 5 We've asked for assurance that a
08:55:09 6 search would be done to ensure that there are not
08:55:13 7 other e-mails floating around that may have been
08:55:17 8 removed from one of their two computers, and we've
08:55:20 9 asked for a privilege log of every document that was
08:55:22 10 withheld for whatever reason.

08:55:25 11 We've asked for that on Monday, and
08:55:28 12 so far we've been told that we're not going to get
08:55:30 13 it, or maybe that we will get it but we haven't
08:55:33 14 gotten it yet. So zero for three right now. We're
08:55:36 15 going to ask the Court compel Reynolds to do those
08:55:39 16 three things.

08:55:40 17 THE COURT: Okay. Was there anything
08:55:41 18 else? I saw your -- is there anything else you
08:55:44 19 wanted to add?

08:55:46 20 MR. LANGSTON: Just so you don't -- my
08:55:48 21 colleague -- the reason we're raising this now is
08:55:50 22 obviously we got the production Friday. We got the
08:55:53 23 new production Monday, so we're not -- I don't want
08:55:55 24 the Court to think that we, you know, are taking up
08:55:57 25 your time now rather than later.

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08:56:00 1 THE COURT: No problem.

08:56:02 2 Counsel for Reynolds and Reynolds.

08:56:04 3 MR. JOHNSON: May I respond?

08:56:05 4 THE COURT: Oh, yes, sir.

08:56:06 5 MR. JOHNSON: Thank you, Your Honor.

08:56:07 6 The reality of this situation is not exactly how it
08:56:10 7 was described by the Government. We received a
08:56:14 8 subpoena that called for compliance on Monday. As
08:56:18 9 we have done in the past in dealing with the
08:56:20 10 Government, we have worked with them. We have tried
08:56:23 11 to provide them documents in advance of when they
08:56:26 12 were entitled to receive them, given the dates of
08:56:29 13 the hearings.

08:56:30 14 We have dealt with 14 subpoenas
08:56:33 15 from the Government. We have tendered 231,000-plus
08:56:38 16 pages of documents to them over the last several
08:56:40 17 years. What the Government is complaining of is a
08:56:44 18 complete production that was made to them on the
08:56:47 19 date that they were entitled to get it.

08:56:50 20 We gave them the bulk of the
08:56:52 21 documents, as they said, on Friday as an
08:56:53 22 accommodation. This document says what it says.
08:56:58 23 What kind of damn fool -- if you pardon my
08:57:02 24 language -- would stand in front of you or anyone
08:57:03 25 else and say, "Well, we were trying to hide this

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08:57:06 1 document?"

08:57:09 2 So we gave it to them on a silver
08:57:11 3 platter on Monday when they were entitled to it to
08:57:14 4 draw attention to this one document. We didn't have
08:57:16 5 any questions they were going to find it as they
08:57:19 6 perused these documents. So the complaint is that
08:57:22 7 they've served with us a subpoena we fully complied
08:57:25 8 with in a timely manner, and I've never seen such a
08:57:29 9 suggestion that someone would come before you and
08:57:31 10 ask you to compel production of something that they
08:57:34 11 have in their possession.

08:57:36 12 Now, they want a backstory on this.
08:57:39 13 I don't think the Court would have a hard time
08:57:41 14 understanding why I can't, in particular, provide
08:57:44 15 them with a backstory. What he did touch on was,
08:57:49 16 "We have been aware of this document."

08:57:51 17 In that production, when our vendor
08:57:53 18 goes out there and collects the documents, what they
08:57:55 19 had asked for, Your Honor, were e-mails between
08:57:58 20 Tommy Barris and Jim Jackson, the two directors of
08:58:02 21 Reynolds and Reynolds. That e-mail was seized in
08:58:09 22 collection from Mr. Barris's computer three times.
08:58:14 23 Mr. Barris -- and I'm going to waive for a very
08:58:16 24 limited purpose the attorney-client privilege --
08:58:19 25 upon his receipt December 3rd last year he sent it

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08:58:22 1 to me. Upon my receipt December 3rd, I said, "Thank
08:58:26 2 you."

08:58:27 3 On December 4th, he sent it to the
08:58:29 4 general counsel of Reynolds and Reynolds, because
08:58:35 5 his concerns -- he wanted him to be aware of it. So
08:58:37 6 we were aware of it. When it came time after we had
08:58:42 7 given the production on Friday, we then realized
08:58:45 8 that for whatever reason this document wasn't in
08:58:47 9 there. And the reason why it wasn't is because the
08:58:49 10 subpoena asked for documents, as I said, between
08:58:51 11 Mr. Barris and Mr. Jackson. That caused it to be
08:58:58 12 collected by our vendor.

08:58:59 13 When the search terms were done, it
08:59:01 14 didn't indicate that it was an e-mail between those
08:59:04 15 two gentlemen. In the first instance, it indicated
08:59:06 16 it was an e-mail from Mr. Barris to me, Tim Johnson.
08:59:12 17 The next one where it was indicated where I, Tim
08:59:15 18 Johnson, sent an e-mail back to Mr. Barris.

08:59:17 19 The third one indicated that it was
08:59:20 20 from Mr. Barris to Mr. Scott Cherry, the general
08:59:25 21 counsel I mentioned earlier. We have since gone
08:59:28 22 back and we have tried to make sure if there were
08:59:30 23 any similar e-mails between Mr. Jackson and
08:59:33 24 Mr. Barris embedded in e-mails that were between
08:59:36 25 different people that weren't caught in our

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08:59:38 1 production that we didn't have any -- that weren't
08:59:41 2 in the same situation.

08:59:43 3 We had found six more. We offered
08:59:46 4 to give it to the Government today. They didn't ask
08:59:48 5 us for three things -- and I can pass this up if you
08:59:51 6 like, Judge. They sent me demand on Tuesday for
08:59:55 7 eight things for a document that we fully complied
08:59:57 8 with in terms of production related to this
08:59:59 9 subpoena.

08:59:59 10 So I don't know what else -- I
09:00:01 11 don't really know why we're here.

09:00:03 12 THE COURT: Okay. So the eight things
09:00:08 13 the Government has requested you've given to them?

09:00:11 14 MR. JOHNSON: No, we have not because I
09:00:13 15 think it's an unreasonable request, and I don't take
09:00:13 16 work assignments from government lawyers. We have
09:00:16 17 tried to work with them. We've tried to meet with
09:00:18 18 them this morning. We did briefly.

09:00:20 19 We're kind of at an impasse, as you
09:00:22 20 might imagine. And I'm hoping it is not showing
09:00:25 21 that much, but I'm a little frustrated. Here it is
09:00:28 22 like a little girl asking Santa Claus for a pink
09:00:31 23 bicycle, and the audacity of youth complaining on
09:00:37 24 Christmas day that she got a turquoise one instead.

09:00:42 25 THE COURT: What I'm still not clear on

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09:00:44 1 is in the production -- in the production produced
09:00:48 2 on Friday -- I mean, yes, it was early and you guys
09:00:50 3 complied with your obligations before you had to,
09:00:58 4 but is there an explanation as to why it wasn't
09:01:00 5 included as part of the production on Friday?

09:01:07 6 MR. JOHNSON: Your Honor, the original
09:01:08 7 e-mail was not collected. That's the part I
09:01:10 8 referenced to you I can't explain for a couple of
09:01:14 9 reasons. But the gentleman whose e-mail server that
09:01:18 10 it was -- should have been on, he's going to
09:01:23 11 testify. They can ask him.

09:01:24 12 They want all sorts of declarations
09:01:26 13 from people. I mean, if you want to ask somebody,
09:01:30 14 he'll be here. That's Mr. Barris.

09:01:33 15 THE COURT: But I guess the
09:01:34 16 Government's concern is, "Well, why was it picked up
09:01:37 17 on Friday?"

09:01:38 18 It's great everybody's got it on
09:01:40 19 Monday, and it's great that the documents were
09:01:43 20 produced early because they weren't due until Monday
09:01:47 21 and produced on Friday, but the question is why
09:01:49 22 weren't they picked up on Friday? I mean, who would
09:01:52 23 have the answer to that? Does the Government know?

09:01:55 24 MR. LANGSTON: So just to address that,
09:01:56 25 Your Honor, obviously Mr. Barris -- were he to

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09:02:01 1 testify truthfully --

09:02:03 2 MR. JOHNSON: Judge --

09:02:04 3 MR. LANGSTON: That --

09:02:05 4 MR. JOHNSON: -- I'm going to object.

09:02:06 5 MR. LANGSTON: -- there's no --

09:02:07 6 MR. JOHNSON: -- there's no reason to

09:02:08 7 be bringing into --

09:02:10 8 THE COURT: Yeah, I'm not -- I'm not --

09:02:13 9 I'm not impugning anybody's credibility. That's not

09:02:16 10 an issue here. The issue -- I'm trying to figure

09:02:20 11 out to solve the problem to make sure we have all of

09:02:22 12 the documents that are responsive to the subpoena

09:02:26 13 requests.

09:02:26 14 MR. LANGSTON: I'm hearing there are

09:02:28 15 six documents I still don't have that they've

09:02:31 16 identified, and I guess have identified but still

09:02:33 17 not brought over to us or to court for whatever

09:02:35 18 reason.

09:02:36 19 MR. JOHNSON: Judge, we've advised them

09:02:38 20 we have them and would be happy to give them to

09:02:40 21 them. We've told the Government that they're not

09:02:42 22 yet Bates labeled. We've tried to do what we can to

09:02:45 23 accommodate the Government's concerns about this

09:02:48 24 issue.

09:02:48 25 What I've told you is that if this

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09:02:51 1 document was given to them on Monday, which you have
09:02:54 2 before you, had them provided on Friday, we wouldn't
09:02:57 3 be here having this discussion. Now they're
09:02:59 4 complaining about receiving what they should have
09:03:01 5 received Friday, which they ultimately received in a
09:03:04 6 timely fashion on Monday.

09:03:06 7 MR. LANGSTON: And, Your Honor --

09:03:07 8 THE COURT: I hear that.

09:03:08 9 MR. LANGSTON: -- exactly our concern.

09:03:09 10 THE COURT: I get it. I hear all of
09:03:11 11 that, but the problem is what the Government is
09:03:13 12 concerned about is that they got it, but they want
09:03:16 13 to know why they didn't get it sooner if there's
09:03:19 14 something behind that -- if there's some problem in
09:03:21 15 the collection process, if there's some issue
09:03:26 16 documents aren't being picked up. I don't know.

09:03:29 17 I think what the Government's
09:03:31 18 trying to figure -- I think this could be cleared up
09:03:34 19 by finding out who is responsible for collecting the
09:03:36 20 documents and talking to them and finding out,
09:03:38 21 "Okay, what did you do to collect the documents, and
09:03:41 22 why wasn't this document picked up earlier?"

09:03:43 23 I think that once you get that
09:03:45 24 answer, then the Government should be satisfied. I
09:03:47 25 mean, once you know why it wasn't picked up earlier

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09:03:49 1 that's the end.

09:03:50 2 MR. JOHNSON: Judge, not to cut you
09:03:53 3 off. We can get a declaration from our vendor that
09:03:55 4 will tell you -- or the Government that tells what
09:03:58 5 steps they went through in doing this production. I
09:04:00 6 just don't know that's going to, you know, be
09:04:02 7 sufficient for the Government. I mean, I think what
09:04:05 8 the Government wants to do -- you know, let's face
09:04:07 9 it. I mean, this has something to do with the
09:04:10 10 credibility of -- potentially of witnesses who are
09:04:13 11 going to appear today, tomorrow -- whenever they
09:04:15 12 appear.

09:04:16 13 Then have the full range of
09:04:19 14 opportunities to examine them on those issues. The
09:04:22 15 vendor is not going to know why something wasn't
09:04:24 16 picked up, tell you the processes they went through
09:04:27 17 in doing their collection.

09:04:28 18 THE COURT: But if it's not reasonable
09:04:30 19 -- if -- -- if they didn't take reasonable steps to
09:04:35 20 make sure a document like this, or take sufficient
09:04:37 21 steps to make sure a document like this was picked
09:04:39 22 up, then that would be an issue.

09:04:41 23 MR. JOHNSON: What I'm saying, Judge, I
09:04:42 24 want to make very clear. The document was picked up
09:04:45 25 three times. They picked it up. It was the process

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09:04:47 1 after that. So if someone -- if Mr. Barris, for
09:04:52 2 example, was intending to that hide that document
09:04:55 3 from the collection and from the Government...

09:04:59 4 THE COURT: Oh, I'm not impugning --
09:05:01 5 I'm not saying anybody's trying to hide anything.
09:05:03 6 The question I have -- I know that's what you are
09:05:06 7 claiming. That's not my point. My point is to see
09:05:09 8 whether or not we've got a process in place that's
09:05:11 9 going to confine documents like this, and make sure
09:05:14 10 if there are other documents like this that they're
09:05:16 11 collected.

09:05:16 12 I'm not -- I mean, you guys want to
09:05:19 13 get into a fight about whether or not it's
09:05:21 14 intentional or not. That's not my concern. I'm not
09:05:24 15 worried about that. I mean, you can make your
09:05:26 16 argument. You can make your argument. Great.

09:05:28 17 What I'm trying to find out is --
09:05:30 18 to make sure the process is in place that everybody
09:05:32 19 from the Court's standpoint, and everybody else can
09:05:36 20 be satisfied that if there's any documents that
09:05:39 21 satisfy the subpoena that haven't been produced
09:05:41 22 they're going to be captured. Then you guys can
09:05:44 23 argue about why they weren't, and the -- and the
09:05:46 24 implication behind that later with the witnesses.

09:05:49 25 So let me take a brief recess. I

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09:05:52 1 want to think about something and take a look at
09:05:55 2 something really quickly, and I'll be right back.
09:05:57 3 (Whereupon, a recess was held.)

09:21:26 4 THE COURT: Okay. Back on the record
09:21:27 5 in this case, everyone. I wanted to take a look at
09:21:31 6 the other documents to see if there was some -- oh,
09:21:33 7 is counsel -- I'm sorry. Please approach.

09:21:42 8 What I wanted to do, and thank you
09:21:43 9 for giving me the other documents. I know they're
09:21:45 10 not all of them, but I was trying to figure out if
09:21:48 11 by looking at those documents there would be some
09:21:51 12 way to understand why those documents were not
09:21:53 13 produced earlier -- I mean some connection, and they
09:21:58 14 don't seem to be related in any way. I don't see
09:22:01 15 any obvious connection between the one document
09:22:04 16 produced on Monday and any of these other documents.

09:22:06 17 So I don't really understand why --
09:22:09 18 you know, I don't know why the search didn't pick up
09:22:13 19 these documents. So I think what we need to do --
09:22:17 20 and as I said, I don't really, respectfully, care
09:22:20 21 about the motivations.

09:22:21 22 You say it was bad faith. You say
09:22:24 23 no one in their right mind would do this and set
09:22:28 24 documents separate and apart.

09:22:30 25 Your argument is they did it

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09:22:32 1 because they knew they were going to get caught.

09:22:34 2 I don't know, and the issue for me
09:22:38 3 is to make sure all of the documents responsive to
09:22:41 4 the subpoena is produced so everybody has them and
09:22:43 5 everybody can review them. The only way to do that
09:22:45 6 is to -- Mr. Barris and the other board member are
09:22:51 7 going to be appearing live, so you can get them.
09:22:54 8 And the person who conducted the document search --
09:22:58 9 I understand that they're willing to provide an
09:23:00 10 affidavit, but they need to sit for a deposition.
09:23:02 11 They need to talk under oath as to what they did,
09:23:05 12 why they did it, what directions they were given and
09:23:09 13 you get to cross-examine them on it.

09:23:12 14 So I'm ordering that person be
09:23:15 15 available for deposition as soon as possible.

09:23:18 16 Counsel, Mr. Smith and your team,
09:23:20 17 you can take a deposition and find out. I mean,
09:23:23 18 we're going to be doing this until next week, so
09:23:27 19 you've got time to take a deposition and find out.

09:23:30 20 You can figure out, you know, why
09:23:32 21 this didn't happen -- why it wasn't produced until
09:23:36 22 later, and if there is anything that needs to be
09:23:38 23 done to make sure that there are not other documents
09:23:41 24 out there.

09:23:41 25 MR. LANGSTON: We appreciate that.

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09:23:43 1 THE COURT: I mean, that's the easy
09:23:44 2 answer. And I'm not commenting on anybody's
09:23:47 3 motives, because honestly at this point in time I
09:23:50 4 don't care why it was done. My only concern is to
09:23:53 5 make sure all of the document have been produced.
09:23:55 6 So respectfully, I need you to produce this
09:23:58 7 gentleman for a deposition, whoever it is. The
09:24:01 8 document -- the document -- whoever is representing
09:24:04 9 the person who ran the search terms and collected
09:24:07 10 the documents.

09:24:08 11 And that way also, Mr. Smith and
09:24:10 12 your team, you can figure out whether or not there's
09:24:12 13 any other documents out there that possibly this
09:24:16 14 search didn't pick up that are responsive to the
09:24:18 15 subpoena and everybody's happy.

09:24:21 16 MR. COREY SMITH: So is there a time
09:24:23 17 frame? We can do it this weekend.

09:24:25 18 THE COURT: You can do it this weekend.
09:24:27 19 I mean, whenever he's available. This is not going
09:24:28 20 to be -- it shouldn't be a long deposition. I mean,
09:24:31 21 it shouldn't be, unless there's something else going
09:24:33 22 on, which I'm --

09:24:34 23 MR. LANGSTON: Sure.

09:24:35 24 THE COURT: -- assuming there is, but
09:24:36 25 should be a short deposition. Sit for it and you

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09:24:39 1 are done. That way everybody's happy.

09:24:41 2 MR. LANGSTON: Your Honor, sort of
09:24:43 3 along those lines, you know, we were handed a
09:24:45 4 privilege log as you went into the back. So we just
09:24:48 5 ask them to take another look. We're seeing things
09:24:51 6 here that are like work product privilege for
09:24:55 7 e-mails between Mr. Barris and Mr. Jackson, neither
09:24:57 8 of whom are lawyers, regarding personnel
09:25:00 9 transitions. And we understand you've already had
09:25:01 10 to review a number of documents associated with this
09:25:04 11 case, so we're trying to not involve the Court, but
09:25:08 12 if you don't mind taking another look.

09:25:11 13 MR. JOHNSON: Your Honor, I would point
09:25:12 14 out to the Court the subpoenas specifically did not
09:25:14 15 provide for the privilege log, which we have
09:25:17 16 produced them as a result of, you know, what this
09:25:21 17 kerfuffle is about here is.

09:25:24 18 MR. LANGSTON: We think we're in a
09:25:26 19 different position Monday than we were prior.

09:25:27 20 THE COURT: I mean, if there are
09:25:29 21 documents that are being held that are responsive to
09:25:31 22 subpoena, then the -- I mean, the answer is -- first
09:25:36 23 of all, the parties try to work it out amongst
09:25:39 24 themselves, which it sounds like you did and weren't
09:25:42 25 able to get that done. Second thing is I'll order a

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09:25:45 1 privilege log to be done. I mean, if there are
09:25:48 2 documents that are not responsive and are being
09:25:51 3 withheld, then I need -- based on privilege, I need
09:25:53 4 to see a privilege log in order to evaluate the
09:25:57 5 privilege.

09:25:58 6 MR. LANGSTON: To be clear the subpoena
09:26:00 7 does request non-privileged communications. It's
09:26:03 8 just as -- you know, there may be a kerfuffle over
09:26:06 9 whether some of these are non-privileged.

09:26:09 10 THE COURT: Why don't you talk to them
09:26:10 11 about it, find out whether they're claiming a
09:26:12 12 privilege, what privilege they're claiming, and if
09:26:15 13 you want to ask for a privilege log or move to
09:26:18 14 compel the documents you know what to do.

09:26:20 15 MR. LANGSTON: Thank you, Your Honor.

09:26:21 16 THE COURT: Move to compel. Ask for a
09:26:22 17 privilege log. I mean, it sounds like they provided
09:26:26 18 one preemptively to you.

09:26:28 19 MR. LANGSTON: Well, we got one today.

09:26:29 20 THE COURT: Well, that shows
09:26:33 21 cooperation. That's what everybody is supposed to
09:26:35 22 do.

09:26:35 23 MR. LANGSTON: Sure.

09:26:37 24 THE COURT: But other than that, they
09:26:38 25 didn't have to do that for you -- I mean,

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09:26:40 1 technically. They've done it. They've taken the
09:26:43 2 step moving in the right direction. You follow up
09:26:45 3 with them and talk to them about whether or not that
09:26:48 4 that's sufficient, or whether or not there's
09:26:51 5 additional documents. If you can't work it out,
09:26:53 6 file a motion to compel. I'll hear that on
09:26:55 7 expedited basis, and then -- you know, I can tell
09:26:59 8 you guys right now if you file a motion to compel
09:27:02 9 the first thing I'm going to need is a privilege
09:27:04 10 log.

09:27:05 11 So, you know, if you are claiming
09:27:06 12 privilege I'll need a privilege log, so you'll have
09:27:09 13 to produce it now or either later.

09:27:14 14 MR. DICKERSON: Judge, Nate Dickerson
09:27:16 15 for Reynolds and Reynolds. First, we have a
09:27:18 16 privilege log, and we provided it to them. We're
09:27:20 17 happy to give the Court a copy now if you like or
09:27:22 18 wait and see --

09:27:22 19 THE COURT: Why don't you talk it over
09:27:24 20 first, and that way see if you can come to some
09:27:27 21 agreement as to why it's privileged or if they need
09:27:30 22 additional information. And if you really can't
09:27:32 23 work it out, then bring it to me.

09:27:38 24 If we had more time, what I would
09:27:40 25 do instead of having a motion to compel is basically

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09:27:43 1 both parties would write me a letter setting out
09:27:46 2 exactly what -- like you did earlier in the other
09:27:49 3 privilege log. I mean, you weren't here for that,
09:27:52 4 but send the letter pointing out exactly -- you
09:27:54 5 know, identifying the people in the privileged
09:27:56 6 documents, what their roles are so that when I look
09:28:00 7 at this I can get an idea of exactly why it should
09:28:03 8 be or shouldn't be privileged.

09:28:05 9 But we don't have that luxury at
09:28:07 10 this point, so just file a motion to compel. If you
09:28:11 11 can't work it out, file a motion. Respond. I'll
09:28:15 12 rule on it. We have to continue the hearing for me
09:28:17 13 to get that done. At the end, we can do that.
09:28:19 14 That's not a problem.

09:28:20 15 MR. LANGSTON: Thank you, Judge.

09:28:22 16 MR. DICKERSON: Thank you, Your Honor.
09:28:23 17 If my may? With regard to the deposition, of course
09:28:26 18 we're happy to produce a representative from the
09:28:29 19 third-party vendor who did the data collection.
09:28:31 20 We're happy to do that if that's what's necessary.
09:28:35 21 In the interest of not wasting anybody's time, I
09:28:37 22 think I can shed maybe a little bit of light on the
09:28:41 23 collection process.

09:28:42 24 Because I don't think at the end of
09:28:44 25 the day the -- what the vendor did, the way they

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09:28:46 1 collected the data, the way they searched the data
09:28:51 2 is going to help resolve this issue at all.

09:28:53 3 THE COURT: Well, it's not just that.
09:28:54 4 So how they did it, coupled with the deposition --
09:28:57 5 or the testimony under oath of the individuals that
09:29:00 6 you are going to call -- with that -- those three
09:29:04 7 individuals -- I mean, the testimony from those
09:29:06 8 three people under oath should clarify it. I mean,
09:29:10 9 because -- you know, first of all the people under
09:29:14 10 oath can say what documents were or were not
09:29:18 11 created. I mean, because it's their documents.
09:29:20 12 They send them back and forth.

09:29:21 13 And then the person who -- the
09:29:23 14 vendor who collects the documents can tell me what
09:29:26 15 they did and whether or not what they did would have
09:29:30 16 picked up those documents. And if it wouldn't have,
09:29:37 17 then there's a problem with the collection process I
09:29:39 18 think, or maybe with the way the subpoena's worded.
09:29:41 19 I don't know, but a deposition is necessary.

09:29:44 20 I mean, he's gotta be deposed and
09:29:46 21 under oath. It's not going to be a statement that's
09:29:48 22 not subject to cross-examination. That's not going
09:29:51 23 to solve anything.

09:29:53 24 MR. DICKERSON: Judge, I appreciate
09:29:54 25 that. Just one point of clarification, just to make

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09:29:59 1 sure we understand. The documents that were
09:30:02 2 collected by the vendor were all of the documents,
09:30:04 3 all e-mail files from -- as Mr. Langston explained
09:30:11 4 the way Mr. Barris's e-mailed were stored, once
09:30:14 5 they're downloaded from the company server, they're
09:30:16 6 only on his laptop. So the vendor went in and
09:30:18 7 collected PST files of all of the e-mails that were
09:30:21 8 on his laptop.

09:30:23 9 Where I think the issue arises is
09:30:26 10 not in the collection -- because everything was
09:30:27 11 collected -- but in the way the searches were run.
09:30:32 12 Um, because of the way the subpoena was worded, what
09:30:34 13 they asked for -- for example, for Mr. Barris's
09:30:37 14 e-mail were all e-mails between Mr. Barris and
09:30:40 15 Mr. Jackson. So we took the collection set of all
09:30:43 16 of Mr. Barris's e-mails and had the vendor filter
09:30:47 17 those with the metadata fields, "To, From, CC, BCC"
09:30:56 18 fields of those e-mails, and ran Mr. Jackson's
09:30:58 19 e-mail address through all of those fields.

09:31:01 20 That's what pulled out the set we
09:31:02 21 used to make our production last Friday.

09:31:04 22 THE COURT: Okay. Well, but -- but
09:31:06 23 it's really easy, though. So the first question to
09:31:09 24 the vendor is, "See Exhibit A. Was Exhibit A part
09:31:13 25 of your initial search? When you did your cull --

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09:31:17 1 your initial search, was this document a part of the
09:31:19 2 exhibit; yes or no? If it was, then the next step
09:31:24 3 is -- and where did it go? What did you do with
09:31:27 4 that document once you got it?"

09:31:29 5 Okay? And then, "Once you figure
09:31:30 6 out what you did with it, did you give it to the
09:31:32 7 lawyers? Did you give it to someone? Where did it
09:31:35 8 go?"

09:31:36 9 Then we can figure out whether it
09:31:39 10 was an issue of the document never being pulled in
09:31:41 11 the first place or whether it's an issue -- and I'm
09:31:43 12 not impugning anybody's credibility or motives, or
09:31:46 13 whether it was -- whether it was pulled initially,
09:31:50 14 but there was some judgment decision made that it
09:31:52 15 wasn't going to be produced, or whether it wasn't
09:31:55 16 produced by accident.

09:31:56 17 But the issue is whether or not the
09:32:00 18 process in place pulled that document. If the
09:32:01 19 vendor says, you know, this document -- and I'll
09:32:05 20 give everything back to you -- "Yes, when I went
09:32:08 21 through the search I found this document and I gave
09:32:10 22 it to somebody."

09:32:12 23 "Who did you give it to?"

09:32:14 24 Okay. Then we find out where it
09:32:14 25 went. And then we need to figure out if the vendor

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09:32:17 1 got it -- if it existed, the vendor got it and sent
09:32:20 2 it to someone, then the next question is why wasn't
09:32:23 3 it produced to the Government sooner?

09:32:26 4 MR. DICKERSON: Judge, respectfully we
09:32:27 5 have the answers to all of those, and we've shared
09:32:29 6 the answers to all of those with the Government.
09:32:31 7 The issue is they don't like the answer.

09:32:33 8 THE COURT: But what's the answer? So
09:32:34 9 was -- was this document that was produced on Monday
09:32:38 10 -- was it pulled by the vendor?

09:32:40 11 MR. DICKERSON: The document that was
09:32:43 12 produced on Monday, yes, it was pulled by the
09:32:46 13 vendor. However, the original document, the
09:32:48 14 original e-mail in the chain from Mr. Jackson to
09:32:52 15 Mr. Barris was not part of the collection. That
09:32:54 16 does not exist in the collection, which indicates
09:32:57 17 that it was not on the laptop.

09:32:59 18 However, as Mr. Johnson explained,
09:33:02 19 there were three additional e-mails, one of which is
09:33:05 20 the version that was produced on Monday --

09:33:07 21 MR. LANGSTON: Can I just stop you
09:33:08 22 right there?

09:33:09 23 THE COURT: Okay.

09:33:11 24 MR. LANGSTON: Limited waiver privilege
09:33:13 25 here, Your Honor. But if they want to waive

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09:33:15 1 privilege to say why this is not, we're going to
09:33:17 2 want to explore why it perhaps was intentionally
09:33:20 3 withheld.

09:33:21 4 THE COURT: Yeah, I don't want to get
09:33:22 5 any further than this, because the first step -- the
09:33:24 6 very, very first step is to take the deposition of
09:33:28 7 the vendor and find out whether this document was
09:33:30 8 pulled as part of the initial cull. If it was, then
09:33:35 9 the issue's going to be what happened between that
09:33:38 10 initial cull and what was produced on Friday. Who
09:33:42 11 made -- you know -- I mean, I don't know.

09:33:45 12 I have no idea, but the first
09:33:46 13 question before we go any further is was the
09:33:48 14 document pulled? If it wasn't pulled, then why not?
09:33:53 15 If it wasn't pulled and -- and it wasn't pulled, are
09:33:57 16 there other documents that might not have been
09:33:59 17 pulled for the same reason?

09:34:01 18 Once we figure that out, you'll
09:34:03 19 have an idea of the universe of documents that are
09:34:05 20 out there, and then you guys can figure out why it
09:34:08 21 wasn't produced sooner.

09:34:10 22 I mean, we can sort that out later,
09:34:12 23 but my initial -- my main concern at this point is
09:34:19 24 was -- or were the documents pulled as part of the
09:34:21 25 initial cull by the vendor? Respectfully, you can't

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09:34:25 1 say that -- I mean, you can say that, Counsel, but
09:34:29 2 you are not the -- you don't have personal
09:34:32 3 knowledge, because you are not the person who did
09:34:34 4 it. I mean, I want the person who did it to tell
09:34:36 5 me, "Yes, this document I pulled and gave it to
09:34:38 6 somebody."

09:34:39 7 "Who did you give it to?"

09:34:41 8 Then you guys can follow up with
09:34:42 9 the questions as to whether the document went
09:34:47 10 between being pulled and, you know, showing up on
09:34:49 11 your doorstep on Monday and you can figure out
09:34:52 12 whether it was pulled and it didn't show up, whether
09:34:55 13 or not there were other documents pulled that
09:34:56 14 haven't shown up on your doorstep yet.

09:35:00 15 What I was trying to do, as an
09:35:01 16 aside by looking at the document that was produced
09:35:04 17 on Monday versus the other documents that haven't
09:35:07 18 been produced yet, is there some common thread to
09:35:11 19 indicate why those documents might not have been,
09:35:13 20 you know, part -- why they might not have been
09:35:17 21 pulled or custody -- they don't seem to be related.

09:35:21 22 MR. DICKERSON: Judge, there is a
09:35:22 23 common thread, if I may again? I'm sorry, to keep
09:35:26 24 jumping in.

09:35:26 25 THE COURT: Sure.

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09:35:27 1 MR. DICKERSON: But the common thread
09:35:29 2 with all seven of these documents is that the latest
09:35:32 3 e-mail in the chain, the most recent e-mail -- you
09:35:35 4 know, how the system pulls it -- is not between
09:35:38 5 Mr. Barris and Mr. Jackson. That was what the
09:35:41 6 subpoena called for. That was the way we ran the
09:35:44 7 searches, e-mails between Mr. Barris on one hand and
09:35:49 8 Mr. Jackson on the other hand.

09:35:50 9 THE COURT: But the first document is
09:35:51 10 between Mr. Barris and Mr. Jackson.

09:35:53 11 MR. DICKERSON: Correct. Somewhere
09:35:54 12 down in the e-mail chain there is an e-mail between
09:36:00 13 Mr. Barris and Mr. Jackson. And those were the ones
09:36:03 14 that were not pulled, because the latest-in-time
09:36:06 15 e-mail was not between the two of them.

09:36:09 16 THE COURT: That brings a problem the
09:36:11 17 Government need to explore. There may be documents
09:36:14 18 directly responsive, but are not being pulled
09:36:18 19 because they're not the latest document in the
09:36:21 20 e-mail chain between Barris and Jackson. So what
09:36:24 21 you are telling me is the only documents that were
09:36:27 22 produced were documents directly between Barris and
09:36:30 23 Jackson that are the most recent recipients of the
09:36:33 24 e-mail.

09:36:34 25 Because -- so what you are telling

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09:36:36 1 me is -- let's say Jackson and Barris e-mail, and
09:36:42 2 there were, like, other multiple e-mails that
09:36:45 3 respond to that e-mail. So you would never get the
09:36:48 4 original Jackson and Barris e-mail, because the way
09:36:50 5 you are telling me the search went, it was only
09:36:53 6 looking for the final e-mail -- the final e-mail --
09:36:57 7 and the final e-mail isn't between Barris and
09:37:00 8 Jackson, then it's not pulled up.

09:37:02 9 MR. DICKERSON: Correct. But
09:37:03 10 theoretically, in the e-mail when you collect all of
09:37:06 11 the e-mails in the PST file, it would have not only
09:37:10 12 latest e-mail, it would have every single one as a
09:37:13 13 separate file, so it should pull all of them out.
09:37:15 14 That's why we ran the additional search once we
09:37:19 15 realized this issue with the one produced on Monday.

09:37:21 16 So instead of just running
09:37:23 17 Mr. Jackson's name through the To, From, CC fields,
09:37:27 18 we went through manually and looked, "Is there
09:37:30 19 anything in this chain that is not part of what we
09:37:32 20 already produced?"

09:37:33 21 THE COURT: That's great, and I think
09:37:35 22 that's what -- that's what you need to get somebody
09:37:36 23 under oath to tell you.

09:37:39 24 MR. DICKERSON: And that's already
09:37:40 25 done.

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09:37:40 1 THE COURT: Well, no. They need to be
09:37:41 2 subject to cross-examination. I mean --

09:37:44 3 MR. COREY SMITH: We understand the
09:37:44 4 Court's ruling. We want someone under oath, subject
09:37:47 5 to cross-examination, to give us some facts. With
09:37:49 6 all due respect to Counsel, yes, they're making
09:37:52 7 representations to the Court. I'm sure they're
09:37:54 8 telling you exactly what they believe happened, but
09:37:56 9 they're not fact witnesses under oath. We
09:37:58 10 understand the Court's ruling.

09:37:59 11 THE COURT: Okay. And I think it's
09:38:00 12 pretty clear. I mean, you can depose them, find out
09:38:02 13 what's going on, and then from there you can figure
09:38:05 14 out whether or not there are other documents.
09:38:07 15 Because, you know, the other thing I heard that was
09:38:09 16 kind of surprising was -- I heard this for the first
09:38:13 17 time this morning, you know, was that executive
09:38:15 18 e-mails, you know, only reside on the laptops
09:38:18 19 themselves, or the -- of the desktops themselves.
09:38:22 20 They don't reside in some sort of mainframe or
09:38:28 21 backup file, which causes more concern because you
09:38:31 22 don't know whether or not -- you know, whether or
09:38:33 23 not you're getting all of the documents that ever
09:38:35 24 existed. You have no idea.

09:38:37 25 So you need to explore that with

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09:38:39 1 them and find out what the person who was collecting
09:38:41 2 the documents did with respect to that knowledge.

09:38:44 3 So anyway, I think the issue is --

09:38:47 4 MR. COREY SMITH: Thank you.

09:38:47 5 THE COURT: Take the deposition,
09:38:48 6 respectfully, over the weekend. Then you guys will
09:38:51 7 have Barris and the other gentleman on the stand.
09:38:54 8 You can ask them on the stand and then we can move
09:39:03 9 on. And then, if there's any implication of
09:39:06 10 wrongdoing, we can take it up once you have the
09:39:08 11 facts. But we've got doctors standing by, so I
09:39:10 12 can't spend more time on this.

09:39:12 13 MR. JOHNSON: Judge, one other matter.
09:39:14 14 They indicated Mr. Barris is going to be called to
09:39:17 15 the witness stand today. I only inquire of the
09:39:19 16 Government if that's changed now given the ruling of
09:39:22 17 the Court?

09:39:22 18 THE COURT: He can be called. If
09:39:23 19 there's something that comes up, you can recall him.

09:39:26 20 MR. LANGSTON: That makes sense.

09:39:27 21 THE COURT: I mean, he gets to be --
09:39:29 22 you know, we've gotta get the witnesses moving. We
09:39:32 23 can't put everything on hold just for one witness.

09:39:35 24 I've got -- I know you haven't been
09:39:37 25 here, Counsel, but we've been juggling everybody's

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09:39:40 1 schedule. It's -- to try to accommodate all of the
09:39:43 2 doctors, all of the folks that have flights to move
09:39:45 3 around.

09:39:49 4 My understanding is Mr. Barris's
09:39:51 5 testimony is part of a mosaic, cobbled together with
09:39:55 6 Defense Counsel and the prosecutors to get
09:39:58 7 everything done timely. So I'm not going to
09:40:01 8 interfere with that. If you want to call them, call
09:40:03 9 them, and can be called again.

09:40:05 10 MR. DICKERSON: Thank you, Your Honor.

09:40:06 11 MR. JOHNSON: Thank you.

09:40:07 12 THE COURT: Thank you, all, and it's
09:40:09 13 good to see you all.

09:40:10 14 MR. DICKERSON: You as well, Judge.
09:40:13 15 Thanks.

09:40:16 16 THE COURT: Okay. Ready for your first
09:40:17 17 witness this morning?

09:40:18 18 MR. LANGSTON: Yes.

09:40:19 19 THE COURT: I'm sorry. We will push
09:40:22 20 through lunch probably a little late. We'll go
09:40:26 21 about 12:15.

09:40:28 22 MR. LANGSTON: Your Honor, the
09:40:29 23 Government calls Dr. Stuart Yudofsky.

09:40:32 24 THE COURT: If someone would like to
09:40:33 25 call Dr. Yudofsky?

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09:40:36 1 MR. MACDOUGALL: Your Honor, if I may
09:40:37 2 be heard?

09:40:37 3 THE COURT: Oh, you are his counsel?

09:40:39 4 MR. MACDOUGALL: Yes, Your Honor. Mark
09:40:40 5 MacDougall for Dr. Yudofsky. As the Court is aware,
09:40:47 6 Dr. -- first, thank you. Like to thank the Court
09:40:51 7 for arranging his testimony this morning.

09:40:55 8 Dr. Yudofsky is being called pursuant to a
09:40:59 9 Rule 17(c) subpoena. His intent on the advice of
09:41:01 10 counsel beyond basic identifying information or
09:41:07 11 questions that could be asked having nothing to do
09:41:09 12 with the case is to assert his right under the Fifth
09:41:14 13 Amendment to decline to answer.

09:41:14 14 You know, one of the -- one of the
09:41:17 15 few nice things about being a lawyer is every now
09:41:19 16 and then, no matter how long you've been doing it,
09:41:23 17 something kind of comes to the surface that you kind
09:41:24 18 of don't expect. That's happened here. I'll be
09:41:26 19 very brief, Your Honor.

09:41:29 20 There is no case that we've been
09:41:31 21 able to find where the Government has proffered
09:41:34 22 enough, you know, motion practice up until now in
09:41:37 23 which the Government in a criminal case is trying to
09:41:40 24 do what the Government's doing today, which is call
09:41:42 25 a witness to the stand without immunity and seek to

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09:41:45 1 persuade the Court to compel him to testify.

09:41:48 2 And the reason there is no such
09:41:50 3 case is that Congress gave the Department of
09:41:55 4 Justice, under Title 18, a unique tool. It's not
09:41:57 5 available to civil litigants. It's not available to
09:42:00 6 defendants. And it's not even really available to
09:42:02 7 the Court, because it can only happen, as the Court
09:42:03 8 knows, on Government motion. We've asked from the
09:42:06 9 beginning for Dr. Yudofsky to be immunized, and he
09:42:09 10 will answer every question the Government has. He
09:42:12 11 will do so again if the Government makes that
09:42:14 12 motion.

09:42:15 13 But if they decline to do that and
09:42:17 14 they seek to persuade the Court to compel him,
09:42:19 15 notwithstanding his assertion of the Fifth
09:42:21 16 Amendment, they're essentially backing into immunity
09:42:25 17 because the case law is very clear that compelled
09:42:27 18 testimony is immunized testimony. So we have a very
09:42:30 19 short bench brief that with the Court's permission
09:42:33 20 I'd like to hand up.

09:42:34 21 THE COURT: Sure.

09:42:40 22 MR. MACDOUGALL: I believe the Court
09:42:41 23 had --

09:42:44 24 THE COURT: This is -- has it been
09:42:46 25 filed yet or...

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09:42:47 1 MR. MACDOUGALL: It'll be filed today.

09:42:49 2 MR. COREY SMITH: Seeing this for the
09:42:51 3 first time, Your Honor.

09:42:52 4 MR. LOONAM: Us, too.

09:42:53 5 MR. LANGSTON: We're happy to respond,
09:42:55 6 but I think we've already had this argument.

09:42:58 7 THE COURT: One second. Well, the
09:43:14 8 first question that I've got -- I mean, I'm familiar
09:43:16 9 with this case law that you cited, because I did
09:43:19 10 some research on this. The question I have is how
09:43:23 11 is the -- I mean, how am I going to -- you know, the
09:43:27 12 Fifth Circuit's pretty clear you just don't blanket
09:43:31 13 give someone -- allow somebody to plead Fifth
09:43:35 14 Amendment blanket without allowing -- without first
09:43:39 15 figuring out whether the testimony they're going to
09:43:41 16 give truly implicates, um, criminal prosecution.

09:43:45 17 The Fifth Circuit has said that
09:43:46 18 it's not just -- it's not just some, "Trifling or
09:43:53 19 imaginary possibility of prosecution. It must be
09:43:57 20 substantial, real, and not merely trifling or
09:44:01 21 imaginary."

09:44:02 22 So basically I need to make the
09:44:05 23 connects between the testimony and the possible
09:44:09 24 criminal prosecution. This is a competency hearing.
09:44:12 25 We're not going to be talking about -- and I mean --

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09:44:14 1 well, it seems like the parties want to get into the
09:44:18 2 merits of the case, and they're doing that. But on
09:44:21 3 the issue of competency, what is -- what can -- what
09:44:26 4 specifically -- my concern is on the issue of
09:44:29 5 competency, what is it that Dr. Yudofsky's going to
09:44:33 6 be asked about that would implicate the Fifth
09:44:38 7 Amendment?

09:44:38 8 I mean, if they ask him about
09:44:40 9 Mr. Brockman's appearance, or they ask him about was
09:44:43 10 he able to do something, or what -- or what did he
09:44:46 11 say, how he said it -- how is that implicating a
09:44:51 12 possible criminal prosecution of Dr. Yudofsky? Some
09:44:55 13 of the other issues, I get it. Because there's been
09:44:57 14 testimony that -- from Mr. Tamine that Dr. Yudofsky
09:45:02 15 allegedly held phones for Mr. Tamine when he was
09:45:08 16 coming into the country or going to hold phones for
09:45:11 17 him. I get that. But if they ask pure questions
09:45:13 18 about competency, how is that implicating the Fifth
09:45:17 19 Amendment?

09:45:18 20 MR. MACDOUGALL: Your Honor, the
09:45:19 21 Court's quite right. The standard is not fanciful.
09:45:21 22 If we get to that point and Dr. Yudofsky's here, he
09:45:24 23 will take the stand and he will go under oath and
09:45:28 24 respond to any questions that are asked. But we'd
09:45:31 25 be prepared to make an in camera ex parte proffer of

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09:45:34 1 what our concerns are.

09:45:35 2 He's acting on the advice of
09:45:38 3 counsel, some of which I would tell the Court would
09:45:40 4 be privileged.

09:45:41 5 THE COURT: Okay.

09:45:42 6 MR. MACDOUGALL: We believe much more
09:45:43 7 to meet that bar of fanciful, but we cannot do it in
09:45:49 8 court. So if we get to that point, like to renew my
09:45:53 9 request.

09:45:54 10 MR. LANGSTON: Judge, we're happy to
09:45:56 11 hand up a list of topics that we want to explore
09:45:59 12 with Dr. Yudofsky if that'll help the Court to make
09:46:06 13 a more educated determination if you do want to do
09:46:07 14 an in camera review.

09:46:07 15 MR. LOONAM: Your Honor, I don't have
09:46:09 16 any dog in this fight at all, except insofar as the
09:46:13 17 Government cannot use immunity as a sword and a
09:46:16 18 shield. They've put on an immunized witness already
09:46:24 19 in this case. So to the extent the Government is
09:46:26 20 going to call Dr. Yudofsky and ask Dr. Yudofsky
09:46:29 21 questions that implicate his Fifth Amendment
09:46:34 22 privilege, and there's some inference to the
09:46:37 23 questions that the Government's asking -- it isn't a
09:46:41 24 jury trial. I get that.

09:46:43 25 But to the extent the Government is

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09:46:44 1 making insinuations through mere questions, which
09:46:47 2 obviously aren't evidence, we would ask that gets
09:46:50 3 cut off, or that they immunize the witness so we can
09:46:55 4 hear his answers. You know, we have no dog in this
09:47:00 5 fight. That's between them. So that's our only
09:47:02 6 position.

09:47:03 7 MR. LANGSTON: Judge, my first question
09:47:04 8 is, "Are you Mr. Brockman's's doctor?"

09:47:08 9 If you want to make an in camera
09:47:10 10 review as to why that would incriminate Dr.
09:47:11 11 Yudofsky --

09:47:12 12 THE COURT: I understand
09:47:13 13 Mr. MacDougall, because he doesn't want to waive his
09:47:15 14 client's rights. I get that. You want to make sure
09:47:20 15 that there's nothing that's said that would possibly
09:47:29 16 cause your client problems later on, and I believe
09:47:32 17 saw you in this courtroom all three days. You know
09:47:34 18 that the parties are getting into -- even though
09:47:39 19 it's a competency hearing, the parties are somewhat
09:47:42 20 getting into the merits of the criminal prosecution.
09:47:45 21 And you're concerned about that, because it could
09:47:48 22 affect your client.

09:47:48 23 I'm there. I understand. I'm just
09:47:53 24 trying to figure out the best way to do this. Is it
09:47:56 25 a combination of looking at the topics and then

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09:47:58 1 talking about the -- about this issue in camera?
09:48:04 2 That might be the way to go, because as I said, this
09:48:06 3 is a competency hearing. We shouldn't really be
09:48:09 4 getting into the merits. Although, the parties are
09:48:11 5 doing that for different reasons, and the fact that
09:48:16 6 they're doing that causes heartburn and concern for
09:48:18 7 your client.

09:48:19 8 I understand, because testifying
09:48:21 9 could implicate -- on the issues of talking about so
09:48:26 10 far, could possibly implicate his Fifth Amendment
09:48:29 11 rights. I'm there. I'm trying to figure out the
09:48:33 12 best procedure to handle this.

09:48:34 13 MR. LANGSTON: I can tell you, we're
09:48:34 14 not going to be asking about phones or any of that.
09:48:37 15 I do think that it -- it probably is most efficient
09:48:40 16 if we give you the topics, and we do the in camera
09:48:43 17 representation. Because it may be -- again, we --
09:48:46 18 we had a discussion with counsel and offered, you
09:48:50 19 know, if they were willing to give us an attorney
09:48:52 20 proffer, we were willing to have a discussion about
09:48:54 21 immunity.

09:48:55 22 Dr. Yudofsky wanted immunity for
09:48:57 23 all crimes ever committed without any representation
09:48:59 24 --

09:48:59 25 THE COURT: I guess I don't need to

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09:49:02 1 know anything about all of that.

09:49:03 2 MR. LANGSTON: Sure. Happy to hand up
09:49:04 3 the topics, and I think it makes more sense to do an
09:49:06 4 in camera review prior to him taking the stand, and
09:49:11 5 then that way we may focus the direction we're going
09:49:13 6 in.

09:49:13 7 THE COURT: Let me see the topics
09:49:15 8 first.

09:49:15 9 MR. LANGSTON: Sure.

09:49:16 10 THE COURT: And then, Mr. MacDougall,
09:49:18 11 let's talk about in camera. Sorry we're holding
09:49:20 12 this up a little bit, but this is important. We're
09:49:23 13 going to take a brief recess, everyone.
09:49:26 14 (Whereupon, a recess was held.)

10:00:44 15 THE COURT: Please be seated, everyone.
10:00:50 16 Mr. MacDougall, based on the summary of topics that
10:01:01 17 the Government was going to get into, coupled with
10:01:04 18 what I have heard so far in this case, I do believe
10:01:07 19 that there's potential that the questions could
10:01:10 20 implicate Dr. Yudofsky's Fifth Amendment. So what I
10:01:14 21 believe we need to do is have an in camera hearing
10:01:17 22 with just you, the Court, and the record sealed with
10:01:23 23 the courtroom cleared.

10:01:26 24 There's an office next to -- that
10:01:30 25 is being used by counsel that's next to this one.

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10:01:33 1 That's gotta be cleared, because there's audio
10:01:35 2 that's potentially in there, because that's my old
10:01:38 3 case manager's office.

10:01:39 4 So whatever in that office next
10:01:42 5 door cannot be there. I've got two CSOs coming to
10:01:48 6 guard the doors while we speak, but this portion of
10:01:53 7 the record will be sealed.

10:01:54 8 Is there anything else we need to
10:01:56 9 do?

10:01:57 10 MR. MACDOUGALL: Two of my
10:01:58 11 colleagues -- if they can be present?

10:01:59 12 THE COURT: Oh, they can be as well.
10:02:01 13 Sir, if you could just clear the courtroom at this
10:02:05 14 time.

10:02:12 15 MR. LOONAM: We'll make sure that's
10:02:14 16 cleared out.

10:02:33 17 THE COURT: Also, we're shutting down
10:02:34 18 real time, because all of you would have access.

10:02:34 19 (Whereupon, the courtroom was vacated.)

10:02:34 20 **THURSDAY, NOVEMBER 18, 2021 -- 10:42 A.M.**

10:52:48 21 **--o0o--**

10:52:48 22 THE COURT: We're back on the record in
10:52:49 23 this case. The Court just held an in camera hearing
10:52:53 24 with respect to Dr. Yudofsky's testimony in this
10:52:56 25 case. And the Court was clear, and the record has

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10:53:03 1 been sealed. And the Court makes the following
10:53:05 2 rulings with respect to Dr. Yudofsky's testimony:

10:53:07 3 After reviewing the summary of
10:53:09 4 questions and topics for Dr. Yudofsky, and
10:53:11 5 considering the evidence that was presented in the
10:53:16 6 -- in camera hearing, the Court finds that the
10:53:18 7 possibility of criminal prosecution, based on
10:53:21 8 Dr. Yudofsky's testimony, is substantial and real,
10:53:24 9 and not merely trifling or imaginary.

10:53:28 10 The Court, looking at the topics
10:53:33 11 that the Government presented, each of those topics,
10:53:37 12 given the information the Court heard both in this
10:53:41 13 case and during the in camera hearing, creates --
10:53:45 14 implicates Dr. Yudofsky's Fifth Amendment rights.

10:53:49 15 So the Court will not order
10:53:51 16 Dr. Yudofsky to testify regarding those six topics.
10:53:56 17 There are facts that Dr. Yudofsky could testify to
10:54:01 18 in this matter, but all of those facts are
10:54:04 19 undisputed, and the Court doesn't find any reason
10:54:08 20 for asking Dr. Yudofsky to come in and testify about
10:54:10 21 those. For example: What is his name? Whether or
10:54:13 22 not he's a doctor of the Brockmans. The time he's
10:54:18 23 known the Brockmans. Whether or not he's treated
10:54:21 24 Elizabeth Bellows (phonetic) and Robert Brockman II.
10:54:30 25 All of those issues are, in this case, undisputed.

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10:54:32 1 And if they become disputed, we can talk about it at
10:54:34 2 that time.

10:54:35 3 But only facts I can find
10:54:37 4 Dr. Yudofsky could testify to are facts that are
10:54:39 5 undisputed in this case. Therefore, the Court at
10:54:42 6 this time will not require Dr. Yudofsky to take the
10:54:45 7 stand and plead before the Court his Fifth Amendment
10:54:50 8 rights.

10:54:50 9 Mr. MacDougall has represented, and
10:54:52 10 just get it on the record, that if Dr. Yudofsky was
10:54:56 11 called, he would assert his Fifth Amendment right
10:54:59 12 with respect to all evidence other than facts that
10:55:04 13 are undisputed in this case.

10:55:06 14 Is that correct, Mr. MacDougall?
10:55:09 15 He would be pleading the Fifth Amendment if he was
10:55:12 16 asked to take the stand.

10:55:13 17 MR. MACDOUGALL: Yes, Your Honor. That
10:55:15 18 is correct.

10:55:15 19 THE COURT: So based on that
10:55:17 20 representation, I don't see any reason to have
10:55:18 21 Dr. Yudofsky testify. So he is excused from any
10:55:24 22 subpoenas that he is under, and we can proceed with
10:55:26 23 the next witness.

10:55:27 24 Thank you, Mr. MacDougall. You are
10:55:29 25 free to stay -- your team is free to stay or leave,

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10:55:32 1 your pleasure.

10:55:34 2 MR. MACDOUGALL: Thank you, Your Honor.

10:55:35 3 THE COURT: You may call your next
10:55:36 4 witness.

10:55:36 5 MR. COREY SMITH: The Government calls
10:55:37 6 Dana Abrahamsen.

10:55:40 7 THE COURT: Okay. Just to clarify
10:56:08 8 again, Counsel, Mr. MacDougall, that's for purposes
10:56:11 9 of this hearing. The Government's free to try to
10:56:16 10 call Dr. Yudofsky at a later date for any
10:56:19 11 proceedings.

10:56:24 12 Hello, sir, if you can step forward
10:56:26 13 and be sworn. If you could raise your right hand.

10:56:26 14 **DANA ABRAHAMSEN,**

10:56:26 15 **(For the Government)**

10:56:26 16 called as a Witness, having been duly
10:56:26 17 and regularly sworn, testified as follows:

10:56:41 18 THE WITNESS: I do.

10:56:41 19 THE COURT: You may take the stand.

10:56:43 20 MR. COREY SMITH: And with

10:56:44 21 Mr. Abrahamsen, Your Honor, the attorney from the
10:56:47 22 FTC is in the courtroom, Burke Kappler. I'd ask he
10:56:51 23 be permitted to sit here, just in case something
10:56:53 24 comes up with regard to this investigation -- not
10:56:55 25 this investigation, that investigation.

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10:56:57 1 THE COURT: Not a problem. You are
10:56:58 2 welcome to sit at counsel table, sir. You may
10:57:01 3 proceed -- oh, yes, sir. You weren't here for the
10:57:04 4 mask rules. When you are on the stand and counsel
10:57:07 5 is addressing you, you don't have to wear your mask.

10:57:12 6 THE WITNESS: Do I take it off all the
10:57:13 7 way?

10:57:14 8 THE COURT: Whatever --

10:57:15 9 THE WITNESS: Is that okay? It's got a
10:57:17 10 rubber band on the back.

10:57:19 11 THE COURT: It's okay. Take it off.
10:57:20 12 Whatever you need.

10:57:21 13 THE WITNESS: Thank you, Your Honor.

10:57:21 14 **DIRECT EXAMINATION**

10:57:21 15 **BY MR. COREY SMITH:**

10:57:25 16 **Q.** For the record, could you please just state
10:57:26 17 your name, and spell your last name?

10:57:26 18 **A.** Sure. Dana Abrahamsen. The last name is
10:57:30 19 A-B-R-A-H-A-M-S-E-N.

10:57:34 20 **Q.** And, Mr. Abrahamsen, how are you employed?

10:57:37 21 **A.** I work for the Federal Trade Commission in
10:57:41 22 Washington.

10:57:41 23 **Q.** What do you do for the Federal Trade
10:57:43 24 Commission?

10:57:44 25 **A.** I'm an attorney.

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10:57:45 1 Q. Can you briefly describe for the Court the work
10:57:47 2 you do for the FTC as an attorney?

10:57:50 3 A. Sure, I work on anti-trust matters.

10:57:52 4 Q. During the course of your duties, did you --
10:57:56 5 were you assigned, or did you come to know an FTC
10:58:00 6 matter involving Reynolds and Reynolds, which also
10:58:03 7 involved the Defendant in this case, Robert
10:58:06 8 Brockman?

10:58:06 9 A. Yes, sir.

10:58:07 10 Q. Could you give the Court a brief description of
10:58:10 11 that matter?

10:58:11 12 A. Sure. The two companies you just mentioned,
10:58:16 13 CDK and Reynolds, they both make something called a
10:58:19 14 DMS, which is a computer software product that
10:58:22 15 virtually every car dealership in the world -- in
10:58:25 16 the United States, in our case -- they have to have
10:58:28 17 these. They're very complicated software products.

10:58:32 18 And they -- dealers use them for a
10:58:34 19 full range of different things in the dealership,
10:58:37 20 selling the cars, having parts inventoried, having
10:58:41 21 car inventory, having rebates, having warranty work,
10:58:46 22 et cetera.

10:58:46 23 And they're sophisticated pieces of
10:58:52 24 software. But there's also in the industry a lot of
10:58:54 25 applications that are made by other third-parties,

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10:58:57 1 and they're very high tech and innovative. Dealers
10:59:01 2 like to get maybe eight or ten of these apps to work
10:59:05 3 on their DMS.

10:59:07 4 And they have to be integrated into
10:59:10 5 the DMS, so there's another layer of companies
10:59:13 6 called integrators that are working in this industry
10:59:17 7 as well. So the apps go through an integrator onto
10:59:20 8 the dealer's DMS.

10:59:22 9 And there was a point of
10:59:24 10 competition between CDK and Reynolds. Reynolds --
10:59:30 11 their public position was they would not permit
10:59:33 12 integrators to be on their DMS, whereas CDK took a
10:59:38 13 more laissez-faire attitude toward it, to the point
10:59:41 14 where CDK was trying to get dealers to switch from
10:59:45 15 Reynolds to CDK because they had a more lax approach
10:59:49 16 to letting these integrators work on the dealers.

10:59:54 17 So our investigation -- and then
10:59:55 18 CDK changed its mind. CDK flipped 180 degrees and
10:59:59 19 said, "No, we're going to close our DMS as well."

11:00:02 20 And that seemed to be an issue --
11:00:07 21 perfectly fine for them to change their mind and do
11:00:10 22 something different. But the question was had the
11:00:14 23 two firms excluded to the point where they both had
11:00:17 24 a meeting of the minds that they would close their
11:00:22 25 DMS.

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11:00:22 1 We didn't expect to find explicit
11:00:25 2 agreement where they shook hands and agreed to that.
11:00:28 3 But in the anti-trust laws, you can infer an
11:00:31 4 agreement by looking at communications between the
11:00:34 5 two and infer whether there was a meeting of the
11:00:36 6 minds. So that's what we were investigating.
11:00:37 7 Q. When did this investigation start?
11:00:39 8 A. Several years ago now. I can't remember
11:00:42 9 exactly.
11:00:43 10 Q. Is it still an open investigation by the FTC?
11:00:45 11 A. Yes, sir.
11:00:46 12 Q. And if you can just maybe summarize it for the
11:00:49 13 Court, what is the objective of -- what are you
11:00:52 14 trying to find? What is the objective of the
11:00:54 15 investigation?
11:00:56 16 A. Really, I'd say the main objective was to find
11:00:59 17 whether the two companies had colluded. Whether
11:01:05 18 there was evidence of collusion.
11:01:06 19 Q. Civil or criminal?
11:01:07 20 A. All of ours are civil.
11:01:09 21 Q. And who was the interested party, or maybe
11:01:12 22 subject of that investigation? Was it just Reynolds
11:01:13 23 and Reynolds, or was it Reynolds and Reynolds and
11:01:15 24 CDK?
11:01:16 25 A. No, it's both companies. The -- we were

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11:01:20 1 investigating whether the two of them colluded.

11:01:23 2 Q. Mm-hmm. Now, during the course of this
11:01:26 3 investigation, did you have occasion to depose
11:01:29 4 Mr. Brockman?

11:01:30 5 A. Yes, we call them investigational hearings when
11:01:34 6 we're at the stage that we're at in this
11:01:42 7 investigation, but it's like a deposition.

11:01:44 8 Q. When was that deposition or investigative
11:01:46 9 hearing?

11:01:46 10 A. I believe it was in September of 2019.

11:01:47 11 Q. Where was this deposition held?

11:01:49 12 A. In Washington D.C., in law firm conference
11:01:54 13 room.

11:01:54 14 Q. Which law firm would that be?

11:01:55 15 A. The law firm that represented Mr. Brockman's
11:01:59 16 firm.

11:02:00 17 Q. And did you conduct this deposition?

11:02:01 18 A. Sheppard Mullin is the name.

11:02:05 19 Q. Sheppard Mullin, just so the record is clear.
11:02:08 20 Okay. Did you conduct this deposition yourself?

11:02:12 21 A. Yes. The way we do it is there would be two
11:02:19 22 lawyers. One lawyer takes -- asks the bulk of the
11:02:22 23 questions, but the other lawyer might ask a few,
11:02:25 24 too, but I ask the bulk of the questions.

11:02:28 25 Q. And could you -- to the extent you can

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11:02:33 1 remember, who was present at this deposition?

11:02:38 2 **A.** I was present. I had a second -- we did it

11:02:41 3 over the course of two days. So I had a second

11:02:43 4 lawyer with me. It was different on the two days,

11:02:46 5 different colleague of mine on the two days.

11:02:50 6 We had an economist with us. The

11:02:53 7 court reporter was there. Mr. Brockman was there,

11:02:58 8 and Mr. Brockman's lawyers from the law firm

11:03:01 9 Sheppard Mullin -- he had I think two. It's in the

11:03:05 10 transcript, so my memory --

11:03:06 11 **Q.** If I can direct your attention to what's been

11:03:09 12 pre-admitted as Government Exhibit 32 and 33. It's

11:03:13 13 the white binder right to your right in the front.

11:03:22 14 I believe it's the one your hand -- yeah, exhibit

11:03:23 15 numbers are in the front.

11:03:24 16 **A.** Which exhibit number was it again?

11:03:25 17 **Q.** 32.

11:03:26 18 **A.** Oh, yeah.

11:03:27 19 **Q.** If you can turn to that, perhaps that will

11:03:30 20 refresh your recollection as to a couple of things.

11:03:33 21 So the first thing I want to ask you is can we put

11:03:37 22 into the record the exact date of the deposition?

11:03:45 23 **A.** Let's see, this is September 18, 2019.

11:03:51 24 **Q.** And who was present at the deposition?

11:03:58 25 **A.** Myself; my colleague, Alex Ansaldo; our

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11:04:02 1 economist, Michael Williams; the court reporter;
11:04:07 2 Michael Cohen, from Sheppard Mullin; and Scott
11:04:13 3 Cherry, who I think is the general counsel of
11:04:17 4 Reynolds; and Jon Emmanuel.

11:04:19 5 THE COURT: Counsel --

11:04:21 6 MS. BLEUSTEIN: Your Honor, we would
11:04:22 7 just like to make the record clear the witness is
11:04:24 8 reading from the document.

11:04:24 9 THE COURT: Okay. Not a problem.

11:04:32 10 MR. COREY SMITH:

11:04:32 11 Q. Do you recall, Mr. Abrahamsen, how long it was
11:04:35 12 before the deposition took place that you noticed
11:04:40 13 the deposition and marked it up -- you know weeks,
11:04:42 14 months, just ballpark?

11:04:43 15 A. No, I don't remember. Generally, it does take
11:04:48 16 some time to set these things up.

11:04:50 17 Q. And before this deposition, had there been a
11:04:53 18 documentary discovery going back and forth or --
11:04:57 19 from the FTC to Reynolds and Reynolds?

11:04:58 20 A. Well, the other way around. We sought
11:05:01 21 documents from Reynolds and Reynolds, and we had
11:05:03 22 documents in our -- yes, we got documents from
11:05:05 23 Reynolds and Reynolds.

11:05:06 24 Q. Yeah, that was an unartfully worded question.
11:05:09 25 That's what I meant. Had there been discovery

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11:05:11 1 requests to Reynolds and Reynolds from the FTC?

11:05:15 2 **A.** Yes.

11:05:15 3 **Q.** Had those been complied with?

11:05:17 4 **A.** Yes, to some extent anyway.

11:05:20 5 **Q.** To the best of your knowledge, do you know

11:05:22 6 whether or not Mr. Brockman prepared for this

11:05:25 7 deposition with his attorneys?

11:05:28 8 **A.** I don't know for sure.

11:05:29 9 **Q.** Were attorneys present during the entire

11:05:32 10 deposition?

11:05:32 11 **A.** Oh, yes.

11:05:33 12 **Q.** How long did the deposition go each day?

11:05:36 13 **A.** From 9:00 in the morning to 1:00 in the

11:05:39 14 afternoon.

11:05:39 15 **Q.** Did you speak -- without getting into the

11:05:41 16 details of the conversations, just the general

11:05:43 17 topics, did you discuss the logistics of the

11:05:49 18 deposition with the Reynolds and Reynolds attorneys?

11:05:51 19 **A.** Yes.

11:05:51 20 **Q.** And that you were going to be deposing

11:05:53 21 Mr. Brockman?

11:05:53 22 **A.** Yes.

11:05:53 23 **Q.** What was his position with Reynolds and

11:05:55 24 Reynolds at the time?

11:05:56 25 **A.** He was the head of the company. He owned it

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11:05:59 1 and he ran it.

11:05:59 2 Q. Was anybody else from Reynolds and Reynolds at
11:06:02 3 the deposition, other than Mr. Brockman?

11:06:04 4 A. Well, his attorneys --

11:06:06 5 Q. Other than the attorneys?

11:06:08 6 A. No, he was the only businessperson in the room.

11:06:10 7 Q. That was my question, thank you. So in working
11:06:13 8 on the logistics of the deposition with the

11:06:18 9 attorneys for Mr. Brockman to appear on

11:06:20 10 September 18th, did any of Mr. Brockman's attorneys

11:06:23 11 raise any medical issues of Mr. Brockman about the
11:06:27 12 deposition?

11:06:28 13 A. Yes. That's, in fact, why we took it at the
11:06:31 14 law firm. They said he had some medical issues, and
11:06:34 15 their law firm was right across the street from a
11:06:36 16 hospital. And that's why -- we usually do them in
11:06:40 17 our office, but we did it at the firm instead.

11:06:44 18 Q. So what medical issues did they tell you about?

11:06:46 19 A. I don't recall any specific issue.

11:06:51 20 Q. Did anybody tell you that at this date, or
11:06:53 21 prior to this date, September 18, 2019, that

11:06:56 22 Mr. Brockman had been diagnosed with dementia?

11:06:59 23 A. No.

11:06:59 24 MS. BLEUSTEIN: Objection as to

11:07:01 25 leading.

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11:07:02 1 THE COURT: Okay. Objection overruled.

11:07:06 2 THE WITNESS: No, absolutely not.

11:07:07 3 MR. COREY SMITH:

11:07:07 4 Q. At any time during the did Mr. Brockman tell
11:07:12 5 you on September 18, 2019, that he had been
11:07:15 6 diagnosed with dementia?

11:07:18 7 A. No, absolutely not.

11:07:19 8 Q. Did he tell you that he had Parkinson's
11:07:20 9 disease?

11:07:21 10 A. No, I don't believe so.

11:07:22 11 Q. Did he tell you that he had Lewy bodies
11:07:24 12 disease?

11:07:24 13 A. I don't believe so.

11:07:25 14 Q. Did he tell you that he had mild cognitive
11:07:28 15 impairment?

11:07:28 16 A. No.

11:07:28 17 Q. Okay. So I want to ask you a couple of
11:07:31 18 questions about some of the exchanges between you
11:07:34 19 and Mr. Brockman during this deposition. If I can
11:07:38 20 ask you to turn to Page 45 of that first exhibit
11:07:42 21 from the first day of the deposition -- 45, Line 1.
11:07:50 22 Yeah, can we switch?

11:07:51 23 THE CLERK: Sure.

11:08:06 24 MR. COREY SMITH:

11:08:07 25 Q. If you can briefly read that to yourself to

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11:08:11 1 refresh your memory of what that exchange was.

11:08:24 2 **A.** Okay. I've looked at the one page.

11:08:28 3 **Q.** Could you summarize for the Court what was the
11:08:30 4 question about -- well, let's start there. What was
11:08:33 5 the question about that you had asked Mr. Brockman
11:08:35 6 in this deposition?

11:08:37 7 **A.** We were asking him about a document. And we
11:08:45 8 were trying to get him to explain a little bit about
11:08:48 9 why -- just to get an understanding of how the
11:08:53 10 company treated the -- data that was in the DMS.

11:09:02 11 **Q.** And Mr. Brockman's answer -- how did he answer
11:09:07 12 that question?

11:09:07 13 **A.** Well, he was explaining the fact that they were
11:09:11 14 fearful of the liability that could arise if there
11:09:15 15 was a data breach. And he started talking about an
11:09:22 16 example involving Franklin Chevrolet, where there'd
11:09:27 17 been apparently a disgruntled employee or something
11:09:30 18 where they'd taken data from a dealership to develop
11:09:33 19 the DMS, and posted it on the internet or something.
11:09:39 20 The dealer, of course, is the person mainly
11:09:41 21 responsible. But Mr. Brockman's point was that as a
11:09:44 22 deep pocket, somebody who had their data -- data
11:09:51 23 breached would come after Reynolds, because they had
11:09:54 24 the deeper pocket.

11:09:55 25 He had this experience with

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11:09:57 1 Franklin Chevrolet, and that's how he explained he
11:10:00 2 first encountered his now -- the lawyer that was you
11:10:05 3 know, sitting next to him. That's how he first came
11:10:07 4 in contact, because even the FTC -- apparently the
11:10:11 5 other part of the FTC from where I work also got
11:10:15 6 involved apparently.

11:10:16 7 He said he was upset because it
11:10:18 8 cost him \$400,000 in legal fees.

11:10:21 9 Q. When you say "He," who are you referring to?

11:10:23 10 A. Mr. Brockman.

11:10:24 11 Q. Now, did you know about this incident when you
11:10:26 12 asked this question in the deposition?

11:10:27 13 A. I don't think I had heard of the incident. I
11:10:31 14 most certainly didn't know the background that, you
11:10:33 15 know, that's how he became involved with Sheppard
11:10:37 16 Mullin, and I certainly didn't know the amount of
11:10:38 17 his legal fee.

11:10:39 18 Q. Do you know how long ago from 2018 -- not
11:10:44 19 today, but 2018 back -- how long ago this incident
11:10:47 20 had occurred?

11:10:48 21 A. No, but it must have been quite -- several
11:10:52 22 years I would think, because I remember Mr. Cohen
11:10:57 23 saying repeatedly that he been representing Reynolds
11:11:01 24 for a long time. So he characterized his
11:11:04 25 representation of them as a long time.

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11:11:06 1 Q. When you say "Them," who do you mean?

11:11:08 2 A. Well, he represented Reynolds. He represented
11:11:12 3 Reynolds for a long time. And Mr. Brockman
11:11:16 4 explained this Chevrolet incident is the first time
11:11:19 5 Reynolds had engaged Mr. Cohen as his lawyer.

11:11:23 6 Q. While you were listening to Mr. Brockman relay
11:11:26 7 this story to you, did it appear to you that he had
11:11:29 8 any problem recalling these facts to tell the story?

11:11:31 9 A. Oh, not at all.

11:11:32 10 Q. Did he need to be prompted by his attorneys to
11:11:35 11 remember any of the facts?

11:11:35 12 A. No.

11:11:39 13 Q. Let me ask you another question you asked. I'm
11:11:41 14 on Page 57.

11:11:52 15 A. Yes, sir. What line?

11:11:54 16 Q. I think his answer, Mr. Brockman's answer
11:11:56 17 starts on Line 5. I would ask you if you could just
11:11:59 18 read that answer to yourself, and then I'm going to
11:12:02 19 ask you a question about it. It's Page 57, Line 5
11:12:05 20 of Exhibit 32.

11:12:15 21 A. Yes, sir.

11:12:15 22 Q. Yeah, do you recall that question and answer
11:12:18 23 exchange now?

11:12:19 24 A. Yes.

11:12:19 25 Q. So could you explain to the jury -- I'm sorry,

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11:12:22 1 to the Judge -- can you explain to the Court what
11:12:26 2 was that question and answer about, and then I'll
11:12:28 3 ask you about the answer.

11:12:29 4 **A.** It was this is -- everything about these DMS's
11:12:33 5 is complicated. The Reynolds had, as I mentioned
11:12:37 6 earlier, stated a position that they would not allow
11:12:41 7 these integrators to come on to their system, but
11:12:45 8 they did let the OEMs onto their system through
11:12:49 9 agents. I was trying to --

11:12:51 10 **Q.** I'm sorry, if I could interrupt. What's an
11:12:56 11 OEM?

11:12:56 12 **A.** Original equipment manufacture like Toyota,
11:13:00 13 Ford, General Motors, et cetera.

11:13:00 14 **Q.** Sorry to interrupt.

11:13:02 15 **A.** So we were talking about the distinction. And
11:13:04 16 then in the answer -- the question and answer you
11:13:07 17 specifically turned my attention to, he was pointing
11:13:11 18 out that under their contractual -- I asked whether
11:13:16 19 the dealer could grant permission to the integrator
11:13:20 20 to come on to its system. And he explained that
11:13:30 21 under their relationship with the dealer, they had
11:13:34 22 contracts in place that did not permit the dealer to
11:13:37 23 give that permission. Only Reynolds could grant
11:13:39 24 that permission, and that was laid out in their
11:13:43 25 contracts.

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11:13:43 1 Q. As far as you know in their investigation --
11:13:47 2 the FTC investigation -- did Mr. Brockman, to your
11:13:51 3 satisfaction, accurately relay the issues in their
11:13:55 4 investigation to you?

11:13:56 5 A. Yes.

11:14:01 6 Q. How long did he go on in this answer?

11:14:03 7 A. It looks like it's about six lines.

11:14:11 8 Q. At any time -- let me start with you. At any
11:14:13 9 time did you have to prompt Mr. Brockman to recall
11:14:15 10 these facts?

11:14:18 11 A. No.

11:14:18 12 Q. At any time did his attorneys -- at least
11:14:21 13 according to the transcript and your recollection --
11:14:23 14 prompt Mr. Brockman and help him recall the facts?

11:14:26 15 A. No. I could only remember maybe one incident
11:14:31 16 where we -- that might have been a discussion, but
11:14:34 17 in the whole two days.

11:14:36 18 Q. And did it appear to you -- well, first of all
11:14:40 19 let me ask you this. This dispute that was the
11:14:42 20 subject of your investigation, how far back did it
11:14:44 21 go back -- not the length of the investigation, but
11:14:47 22 how far back in history in the business relationship
11:14:50 23 between Reynolds and Reynolds and CDK did your
11:14:54 24 investigation reach back to?

11:14:55 25 A. I'm not sure I understood the question. You

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11:14:58 1 said the dispute.

11:14:59 2 Q. Let me rephrase. Maybe that was unartful.

11:15:02 3 What I'm asking is not the length of your

11:15:04 4 investigation. I'm asking about how -- what is the

11:15:07 5 subject matter of your investigation -- how far back

11:15:11 6 in time did it reach -- how far back in time were

11:15:14 7 the events you are interested in go back?

11:15:20 8 A. Do you mean the difference the two companies

11:15:22 9 had between integration -- how far back at odds on

11:15:25 10 that issue?

11:15:26 11 Q. Correct?

11:15:27 12 A. I don't know precisely. I know I can remember

11:15:31 13 one document that Mr. Brockman had written where he

11:15:35 14 said, "You've been doing this on my machines for

11:15:39 15 20 years."

11:15:40 16 So it had been a long time.

11:15:42 17 Q. Now, in that question and answer on Page 57,

11:15:45 18 there's a reference to -- on Page 58 and 59 to an

11:15:55 19 exhibit to the deposition. Do you see that?

11:16:09 20 A. No. Where's the exhibit you mention?

11:16:11 21 Q. Somewhere on 58 and 59. It's Exhibit 1143.

11:16:19 22 A. On 57 we're talking about 4043.

11:16:23 23 Q. Oh, 58 and 59.

11:16:38 24 A. I'm sorry, I'm unable to find a reference to an

11:16:42 25 exhibit.

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11:16:42 1 Q. That's all right. Can we pull up that exhibit?
11:16:44 2 Yeah, we'll pull up the exhibit to your deposition
11:16:47 3 1143 and put it on the screen.

11:16:52 4 MR. COREY SMITH: This is Exhibit 34
11:16:54 5 for this hearing, Your Honor, the set of exhibits to
11:16:57 6 the deposition.

11:16:58 7 Q. I just want to ask you what this is. This was
11:17:01 8 an exhibit to your deposition.

11:17:04 9 A. It's very blurry on the screen. I think it's
11:17:09 10 an e-mail from the CEO of CDK to Mr. Brockman.

11:17:17 11 Q. What is the date of the e-mail?

11:17:18 12 A. That's better. July 2, 2014.

11:17:24 13 Q. Did you ask Mr. Brockman about -- about his
11:17:27 14 relationship or interactions with Mr. Steve Anenen?

11:17:31 15 A. Oh, yes. We had several documents. This is
11:17:34 16 one of them where they communicated with one
11:17:37 17 another, and we knew of phone calls they had -- at
11:17:41 18 least one phone call. And, yes, we needed to
11:17:47 19 understand the substance of their communications.
11:17:50 20 There were a number of questions about these
11:17:52 21 communications.

11:17:55 22 Q. Did you show this e-mail to Mr. Brockman during
11:17:57 23 the deposition?

11:17:58 24 A. Yes.

11:17:58 25 Q. Did he -- did it appear to you that he recalled

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11:18:01 1 the e-mail?

11:18:02 2 **A.** Yes.

11:18:02 3 **Q.** Did it appear to you in his answers that he
11:18:07 4 recalled who Steve Anenen is?

11:18:09 5 **A.** Oh, yeah, he definitely -- yes, he knew
11:18:12 6 Mr. Anenen.

11:18:12 7 **Q.** Did he answer questions that you put to him
11:18:14 8 about his conversations with Mr. Anenen, the CEO of
11:18:19 9 CDK, from 2014?

11:18:21 10 **A.** Yes, and there were other conversations in 2012
11:18:27 11 as I recall.

11:18:28 12 **Q.** Did Mr. Brockman appear to you to recall those
11:18:30 13 historical facts?

11:18:31 14 **A.** Oh, yeah.

11:18:32 15 **Q.** So let me ask you about another question you
11:18:34 16 asked. This one's on Page 99 -- I'm sorry, 94. My
11:18:48 17 apologies, 94.

11:18:49 18 **A.** What line?

11:18:50 19 **Q.** Line 7 -- what are. I'm sorry.

11:19:03 20 **A.** It's a lengthy answer, I'm sorry.

11:19:05 21 **Q.** Yeah, that's all right.

11:19:13 22 **A.** Goes on for several pages.

11:19:15 23 **Q.** Just the part on 94. Read that to yourself to
11:19:20 24 refresh your memory.

11:19:23 25 **A.** Yes.

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11:19:23 1 Q. So what I want to ask you is first,
11:19:26 2 Mr. Abrahamsen, what is it you are asking
11:19:28 3 Mr. Brockman in this question?

11:19:29 4 A. The -- in addition to understanding the
11:19:35 5 communications between Mr. Brockman and Mr. Anenen,
11:19:39 6 the two CEOs, we were also interested -- there were
11:19:43 7 far more communications between a person who is
11:19:48 8 directly below Mr. Brockman who is a Mr. Schaefer,
11:19:54 9 and he communicated extensively with his colleague
11:19:58 10 at CDK, Mr. Gardener.

11:20:00 11 In addition to trying to understand
11:20:01 12 the direct communication between the two CEOs, we
11:20:04 13 also wanted to ask about the communications between
11:20:07 14 the people just below the CEO level, and that is
11:20:11 15 sort of what we're getting into here.

11:20:16 16 And Mr. Schaefer is a direct report to
11:20:18 17 Mr. Brockman, and I'm asking him what he knew about
11:20:21 18 Mr. Schaefer's communications with CDK.

11:20:22 19 Q. That was something of interest to you in your
11:20:25 20 investigation?

11:20:25 21 A. Oh, absolutely.

11:20:27 22 Q. What did Mr. Brockman tell you about
11:20:29 23 Mr. Schaefer?

11:20:30 24 A. Quite a bit of his history going back to when
11:20:34 25 Mr. Schaefer played basketball in college. He said

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11:20:38 1 Mr. Schaefer still held records that he set as a
11:20:44 2 basketball player in college. Mr. Schaefer is
11:20:47 3 probably approximately my age.

11:20:48 4 And he went on and gave a lengthy
11:20:51 5 history about what Mr. Schaefer's role was in the
11:20:55 6 company, and he developed some of the software in
11:20:57 7 the DMS. Apparently Mr. Schaefer had a patent
11:21:02 8 granted on the -- some of the work he did on the
11:21:06 9 Reynolds DMS.

11:21:08 10 And then he went on to explain that
11:21:12 11 Mr. Schaefer apparently was near -- about to be
11:21:15 12 fired when Mr. Brockman bought Reynolds. And
11:21:19 13 Mr. Brockman thought highly of Mr. Schaefer and kept
11:21:22 14 him on, and that was the background he was giving
11:21:25 15 me.

11:21:25 16 Q. So when Mr. Brockman was giving you
11:21:27 17 Mr. Schaefer's history, did it appear to you that he
11:21:29 18 had any problem recalling these facts, all the way
11:21:32 19 back to Mr. Schaefer's high school basketball career
11:21:35 20 -- I'm sorry, college basketball career?

11:21:39 21 A. No, he was telling me stuff I didn't know.

11:21:41 22 Q. Did anybody, if you can recall, during this
11:21:44 23 deposition anybody in the room prompt Mr. Brockman
11:21:47 24 to relay these stories to you or this history to
11:21:50 25 you?

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11:21:50 1 **A.** No, not -- as I said, there was one other
11:21:53 2 incident. But, no, this was all coming straight
11:21:56 3 from him.

11:21:56 4 **Q.** All right. Let me ask you one more page on
11:22:00 5 this day on Page 99, Line 18.

11:22:32 6 **A.** I've read the answer on that page.

11:22:36 7 **Q.** All right. So what was the question that you
11:22:37 8 were asking Mr. Brockman in that exchange?

11:22:45 9 **A.** Excuse me, the question had to do with whether
11:22:48 10 there was any discussion between CDK and Reynolds
11:22:52 11 about making a joint announcement. They were
11:22:56 12 entering into written contracts that were going on
11:23:00 13 simultaneously with the unwritten agreement we were
11:23:03 14 investigating.

11:23:04 15 And the question had to do with
11:23:06 16 whether the two firms had agreed to come out with
11:23:10 17 public comments when they finished and executed the
11:23:16 18 written agreements that came into existence.

11:23:19 19 **Q.** Are these written agreements between two and
11:23:21 20 two?

11:23:22 21 **A.** CDK and Reynolds.

11:23:24 22 **Q.** Now, in his answer on 19 he references ADP.
11:23:30 23 What's ADP?

11:23:31 24 **A.** ADP was -- is a very large company, and it had
11:23:36 25 a subsidiary that made DMS's. Then they spun that

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11:23:41 1 off, and CDK is the publicly held company that now
11:23:47 2 holds the division that used to be part of ADP.

11:23:51 3 Q. Do you know when that spinoff occurred?

11:24:00 4 A. I'm going to say probably sometime in the --
11:24:12 5 sometime probably 2000 to 2010 would be my best
11:24:16 6 recollection. I mean, I know the answer to that. I
11:24:18 7 mean, at some point -- I -- I know we had
11:24:20 8 established that precisely, but I just don't recall.

11:24:23 9 Q. Based on your observations at this deposition,
11:24:26 10 did Mr. Brockman appear to have any trouble
11:24:29 11 recalling who ADP was and its relationship to CDK?

11:24:32 12 A. Oh, no. Not at all.

11:24:33 13 Q. Back you up to Page 98, Line 10. When you are
11:24:49 14 done, you can let me know.

11:25:02 15 A. Okay. I've read the question and answer.

11:25:04 16 Q. So what did you ask Mr. Brockman in that
11:25:06 17 exchange?

11:25:06 18 A. I was asking him about whether he and
11:25:09 19 Mr. Schaefer had discussed a possible interaction
11:25:14 20 with CDK about coming up with a common market
11:25:18 21 message.

11:25:19 22 Q. And how did Mr. Brockman answer that question?

11:25:22 23 A. He said, "My answer is the same. We are now
11:25:25 24 down really into the weeds, and my memory just is
11:25:29 25 not that good."

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11:25:31 1 Q. Is this the incident you previously testified
11:25:33 2 to, the one incident where Mr. Brockman said that
11:25:35 3 his memory wasn't that good?

11:25:38 4 A. No, if I made a reference to any of the
11:25:42 5 testimony previously it had to do with a date.

11:25:44 6 Q. Oh, I see. I see.

11:25:46 7 A. This is not it, no.

11:25:47 8 Q. But to the best of your recollection,
11:25:49 9 Mr. Abrahamsen, is this the only time this exchange
11:25:52 10 now on Page 98, Line 10, that Mr. Brockman made
11:25:55 11 reference to his memory?

11:25:57 12 A. I don't recall.

11:25:58 13 Q. Okay. Let me ask you to turn to one last page
11:26:06 14 and this is Page 100, Line 18 -- actually answer
11:26:15 15 starts at Line 15 and it goes to Line 22.

11:26:46 16 A. Yes, I've read it.

11:26:47 17 Q. Okay. So what were you asking the Defendant in
11:26:51 18 that exchange?

11:26:53 19 A. The Defendant?

11:26:54 20 Q. I'm sorry, Mr. Brockman, the defendant in this
11:26:58 21 case?

11:26:59 22 A. Oh, okay. There was a -- I think even
11:27:03 23 referenced this earlier. There was a request by
11:27:06 24 Mr. Brockman to Mr. Anenen that Reynolds be able to
11:27:12 25 access the CDK DMS for its -- its sole applications

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11:27:21 1 as well.

11:27:21 2 It wanted its application to be
11:27:24 3 able to go on to the CDK DMS for free for 20 years.
11:27:31 4 Because -- his logic was that CDK had been -- they
11:27:37 5 owned an integrator that had been taking data from
11:27:41 6 Reynolds for 20 years.

11:27:43 7 Q. Who is "They"? Who is "They"?

11:27:47 8 A. Oh, CDK owned two subsidiaries that -- they
11:27:52 9 bought them and they were integrators. Those
11:27:55 10 integrators owned by CDK had been taking -- they'd
11:28:00 11 been using the Reynolds DMS -- they were an
11:28:06 12 integrator, so they were putting third-party apps
11:28:09 13 onto the Reynolds DMS through the integrator
11:28:15 14 subsidiaries that CDK owned.

11:28:18 15 Q. What was Mr. Brockman's position about this
11:28:20 16 conduct you are just relaying to the Court?

11:28:22 17 A. Right. He was very negative about that
11:28:26 18 conduct. He was very anxious to stop it. And in
11:28:30 19 return, he wanted them to stop doing that, and then
11:28:33 20 he wanted them to give him 20 years of free access
11:28:35 21 to their DMS -- to the CDK DMS because he felt that
11:28:41 22 was what had been going on.

11:28:44 23 Q. This whole issue of your FTC investigation
11:28:46 24 about integrators and accessing databases and
11:28:49 25 applications, do you consider this a complex topic?

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11:28:54 1 **A.** It certainly was for me.

11:28:57 2 **Q.** In this deposition for two days when you were
11:29:00 3 observing Mr. Brockman, what were your observations
11:29:05 4 about whether or not he had command of these
11:29:07 5 difficult, technical issues?

11:29:09 6 **A.** He had tremendous command of these technical
11:29:12 7 issues. He also had great command of the history
11:29:16 8 of, you know, his company and the other people in
11:29:18 9 the industry.

11:29:22 10 **Q.** Let's turn to the second day, which is
11:29:25 11 Exhibit 33. I'm going to ask you a couple more
11:29:27 12 questions about the deposition, but this time on the
11:29:29 13 second day. I want to start at page 119, and just
11:29:39 14 ask you about a couple of the exchanges you had with
11:29:41 15 Mr. Brockman.

11:29:47 16 **A.** Yes, which line?

11:29:48 17 **Q.** Page 19, starting -- 119, starting at line 21?

11:30:15 18 **A.** Yes, I've read it.

11:30:16 19 **Q.** Okay. And so, first of all what is the subject
11:30:20 20 matter of these questions -- well, let me back up a
11:30:23 21 second. This is the very beginning of the second
11:30:25 22 day?

11:30:31 23 **A.** Yes, towards the beginning anyway.

11:30:33 24 **Q.** What is the subject matter of your questions on
11:30:35 25 the beginning of the second day?

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11:30:39 1 **A.** Well, on this particular page you asked me to
11:30:41 2 turn to, we're asking him about a system that CDK
11:30:51 3 had developed called 3PA, third-party access I
11:30:59 4 believe is what the acronym stands for.

11:31:03 5 He said he had not known about it,
11:31:05 6 but apparently they had developed it. He was
11:31:08 7 learning from an exhibit I was showing him. He had
11:31:11 8 learned at the time of the exhibit -- you know,
11:31:13 9 about in that time period -- that CDK had this 3PA,
11:31:20 10 which is essentially a port where if you had an
11:31:23 11 application and you wanted to go -- not from an
11:31:25 12 integrator, but if you wanted to go directly on to
11:31:28 13 the DMS with the permission of the DMS holder -- in
11:31:35 14 other words CDK -- if Mr. Brockman owned an
11:31:38 15 application and he wanted it to integrate on CDK's
11:31:42 16 DMS's without using an integrator, he would go
11:31:46 17 through 3PA, third-party access, which is a computer
11:31:50 18 port.

11:31:51 19 **Q.** And this topic, this subject matter, had you
11:31:55 20 started asking Mr. Brockman about it the day before?

11:31:57 21 **A.** I don't recall.

11:31:59 22 **Q.** And this issue that you are -- well, you want
11:32:03 23 to take a look at the deposition.

11:32:05 24 **A.** I'll do whatever you want me to do.

11:32:06 25 **Q.** Well, let me ask you this. This -- what you

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11:32:10 1 just described to the Court, these third-party
11:32:12 2 access -- this portal, are these items and facts
11:32:17 3 that you relayed to Mr. Brockman, or did
11:32:21 4 Mr. Brockman relay them to you?

11:32:22 5 **A.** Well, in this narrow context of asking him
11:32:25 6 about this exhibit, he was relating to me that his
11:32:32 7 knowledge and his thought process in terms of how he
11:32:35 8 first learned about it, and what his reaction was to
11:32:38 9 learning about it -- and he goes on the next page
11:32:41 10 and says, "Well, I was glad to see they had this,
11:32:46 11 because it means it was up and running, and it would
11:32:48 12 be a lot easier for me to use a process that had
11:32:51 13 already been established by them, rather than
11:32:53 14 starting from scratch."

11:32:54 15 **Q.** Is there a timeframe when these chain of events
11:32:59 16 started that Mr. Brockman relayed to you about what
11:33:01 17 you are talking about now?

11:33:04 18 **A.** Um --

11:33:05 19 **Q.** What year?

11:33:06 20 **A.** Um, most of the questions we were talking to
11:33:12 21 him about -- the bulk of them would been between
11:33:16 22 2012 and 2015.

11:33:18 23 **Q.** When you were asking Mr. Brockman these
11:33:21 24 questions about these business transactions and his
11:33:25 25 software from 2012 to 2015, did he appear to you to

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11:33:29 1 have any problem recalling any of these historical
11:33:32 2 facts?

11:33:33 3 **A.** No.

11:33:33 4 **Q.** Did -- during his answering of the questions,
11:33:36 5 did any of his attorneys have to prompt him?

11:33:39 6 **A.** As I said, there may have been one incident
11:33:41 7 involving a year, but beyond that, no. His -- no.

11:33:45 8 **Q.** All right. Let me show you one of the exhibits
11:33:47 9 to the second day. Again, this is Exhibit 34. It
11:33:53 10 is your deposition exhibit CX-4043 contained within
11:34:00 11 Government Exhibit 34. It's on the left-hand side
11:34:05 12 of the screen.

11:34:08 13 **A.** Can we make it any bigger?

11:34:11 14 **Q.** Yeah, if you can enlarge the exhibit that would
11:34:13 15 be great. Just a couple quick questions on this
11:34:16 16 exhibit. Do you know what this is?

11:34:17 17 **A.** Can we -- is that the very top of the -- --

11:34:31 18 **Q.** Let's try -- I'm sorry. Do you know what this
11:34:33 19 is?

11:34:33 20 **A.** I believe these are notes Mr. Brockman had
11:34:36 21 prepared for himself in anticipation of a telephone
11:34:40 22 call with Mr. Anenen at CDK.

11:34:44 23 **Q.** Can we show 1143 --

11:34:46 24 **MR. LOONAM:** Can we get a timeframe for
11:34:47 25 that document?

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11:34:48 1 MR. COREY SMITH: We're going to do
11:34:50 2 that right now in the next exhibit.

11:34:51 3 MR. LOONAM: Okay. Yeah, just enlarge
11:35:01 4 the top.

11:35:02 5 Q. So again, this appears to be another e-mail
11:35:07 6 between Mr. Brockman and Steve Anenen?

11:35:10 7 A. Steve Anenen.

11:35:11 8 Q. So in the deposition, are you asking him about
11:35:13 9 exchanges between himself and the CEO of CDK?

11:35:16 10 A. Yes.

11:35:17 11 Q. Does this pertain to the notes we just saw in
11:35:20 12 Exhibit 4043?

11:35:23 13 A. I believe there were exchanges -- there were
11:35:26 14 two different exchanges. I think the prior exhibit
11:35:29 15 you showed me with the talking points, I believe we
11:35:34 16 identified that as having been prepared in 2012.

11:35:37 17 Q. Okay. And what about this e-mail?

11:35:39 18 A. Well, it's dated July 2, 2014.

11:35:42 19 Q. Can you explain to us -- more importantly the
11:35:46 20 Court -- why were these exchanges between
11:35:49 21 Mr. Brockman and the CEO of CDK so important to you?

11:35:52 22 A. The two companies had lengthy negotiations that
11:35:59 23 resulted in three executed written contracts that
11:36:03 24 were not directly related to our investigation.

11:36:07 25 They were not -- they would not have been directly

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11:36:10 1 related -- with the possible exception of one
11:36:14 2 paragraph -- they were not directly related to our
11:36:16 3 investigation.

11:36:17 4 But it did appear that there were
11:36:20 5 communications between the two companies that we
11:36:22 6 wanted to understand better to see whether there was
11:36:25 7 also an unwritten agreement that was the subject of
11:36:27 8 our investigation.

11:36:29 9 Q. Were there a number of questions about
11:36:32 10 Mr. Brockman's communications with Mr. Anenen?

11:36:36 11 A. Oh, yes.

11:36:37 12 Q. Did it appear to you Mr. Brockman had any
11:36:40 13 problems recalling who Mr. Anenen was?

11:36:42 14 A. No, he knew who he was.

11:36:44 15 Q. Did it appear to you he had any problem
11:36:46 16 recalling some of these conversations?

11:36:47 17 A. No, he -- he recalled them.

11:36:51 18 Q. So let me ask you to turn now to another page,
11:36:54 19 Page 135 of the second day, which is Exhibit 33 of
11:37:05 20 this hearing.

11:37:05 21 A. Do you have a line?

11:37:06 22 Q. Yes. Um -- well, starting 135 -- well, let's
11:37:20 23 start at Page 135, and then get to a different page
11:37:22 24 and a specific line. If you can just read that -- I
11:37:25 25 want to ask you the subject matter of what you are

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11:37:27 1 asking.

11:37:44 2 **A.** There was an e-mail exchange that -- between
11:37:48 3 the two companies that -- to our reading of the
11:37:52 4 exhibit anyway made it sound like Mr. Schaefer was
11:37:58 5 telling CDK that it was important that CDK give some
11:38:03 6 sort of market message about this very issue we're
11:38:07 7 talking about. Whether, you know, it was going to
11:38:10 8 be an open or closed system.

11:38:12 9 And I was asking Mr. Brockman
11:38:14 10 whether he and Mr. Schaefer discussed this. That
11:38:19 11 was -- that was the inquiry.

11:38:22 12 **Q.** And again, did Mr. Brockman have any problem
11:38:25 13 relaying those facts to you?

11:38:27 14 **A.** No, he said he didn't recall any conversation
11:38:31 15 of that type with Mr. Schaefer.

11:38:33 16 **Q.** During the course of this deposition and your
11:38:36 17 investigation, did you come across an entity by the
11:38:40 18 name of Superior -- not sure of the exact name.

11:38:44 19 **A.** I think it's Superior Integration Services. It
11:38:48 20 went by the acronym SIS.

11:38:50 21 **Q.** So what is that?

11:38:51 22 **A.** It is an integrator.

11:38:54 23 **Q.** Why was that something you were asking
11:38:56 24 Mr. Brockman about?

11:38:57 25 **A.** We asked about asking various integrators we

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11:39:04 1 knew existed in the industry.

11:39:05 2 Q. If I can ask you to turn to Page 143 of your
11:39:09 3 deposition, Line 1.

11:39:23 4 A. I'm sorry, 143.

11:39:26 5 Q. Yes, sir, 143.

11:39:34 6 A. Yes, this is line -- Line 1 is in the middle of
11:39:38 7 an answer, or the answer begins on the bottom of the
11:39:41 8 prior page. Yes, I'm asking him about a paragraph
11:39:48 9 that was in a settlement agreement between Reynolds
11:39:53 10 and SIS.

11:39:55 11 Q. And why was that important to you?

11:39:57 12 A. There was similar language in the agreement
11:40:01 13 that -- one of the three agreements eventually
11:40:06 14 entered into between Reynolds and CDK.

11:40:08 15 Q. Was there something that occurred between SIS
11:40:11 16 and Reynolds and Reynolds that was of interest to
11:40:14 17 you?

11:40:15 18 A. Well, we wanted to know the background of --
11:40:18 19 you know, we wanted to know the background of
11:40:20 20 everything that was going on in the industry. But
11:40:22 21 we wanted to know specifically about the origin of
11:40:26 22 this particular paragraph.

11:40:28 23 Q. Why is that?

11:40:29 24 A. Because as I said, it showed up in the final
11:40:33 25 agreement -- final written agreement between

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11:40:36 1 Reynolds and CDK.

11:40:40 2 Q. When did this agreement become entered into?

11:40:43 3 A. Between Reynolds --

11:40:45 4 Q. Reynolds and SIS. I think we have the
11:40:48 5 agreement as attached. It's 4036 I think.

11:40:51 6 A. I used it as an exhibit, I remember.

11:40:54 7 Q. Yeah, 4036 to his deposition.

11:41:01 8 A. That's not the settlement agreement.

11:41:04 9 Q. 4273, the next exhibit. Is that the settlement
11:41:14 10 agreement? That's it. Is that it?

11:41:22 11 A. Yes, that's it. And the date is in the
11:41:25 12 agreement somewhere. It's on -- somewhere in the
11:41:28 13 agreement it's dated.

11:41:30 14 Q. Do you recall, from your memory, approximately
11:41:33 15 when this settlement agreement was entered into?

11:41:37 16 A. I mean, the written agreement's between CDK and
11:41:41 17 Reynolds were 2015. This was probably one to three
11:41:46 18 years earlier.

11:41:53 19 Q. Summarize, briefly for us, your understanding
11:41:56 20 of what was the issue between Reynolds and Reynolds
11:41:57 21 and SIS.

11:41:58 22 A. Sure. SIS was an integrator. It was doing
11:42:03 23 integration on the Reynolds DMS for various
11:42:06 24 application providers. There was a lawsuit over
11:42:10 25 that, whether that was permitted or not. They

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11:42:13 1 settled the lawsuit with the understanding that SIS
11:42:18 2 would stop doing integration services on Reynolds
11:42:24 3 going forward. But that for the clients that SIS
11:42:31 4 had that were integrating through SIS, they'd be
11:42:34 5 given a wind-down period where instead of just
11:42:37 6 having those apps cut off and the dealer not being
11:42:39 7 able to use them, they would let those applications
11:42:45 8 continue to function through the SIS integration
11:42:48 9 system for a period of time until they could be
11:42:51 10 migrated into a direct relationship with Reynolds.
11:42:57 11 Q. So did Reynolds and Reynolds -- at least is it
11:43:00 12 your understanding Reynolds and Reynolds had a
11:43:01 13 problem with what SIS was doing?
11:43:04 14 A. Oh, yes.
11:43:05 15 Q. And the settlement agreement was the result?
11:43:08 16 A. It resolved the problem.
11:43:09 17 Q. After the settlement agreement, what's your
11:43:11 18 understanding of whether or not SIS was still going
11:43:14 19 to have access to the Reynolds and Reynolds DMS?
11:43:17 20 A. Well, it was our understanding going in that
11:43:20 21 this was going to be the end of SIS as a hostile
11:43:27 22 integrator, according to the settlement, or terms of
11:43:27 23 the settlement.
11:43:27 24 Q. Did you ask Mr. Brockman about this dispute --
11:43:30 25 this issue?

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11:43:31 1 **A.** Oh, yes.

11:43:31 2 **Q.** Did it appear to you that he had any problems
11:43:34 3 recalling the issue?

11:43:35 4 **A.** No.

11:43:35 5 **Q.** Who is Mr. Bautista?

11:43:38 6 **A.** Um, I believe Mr. Bautista was the gentleman
11:43:41 7 that ran SIS.

11:43:45 8 **Q.** I want to direct your attention to Page 144,
11:43:48 9 Line 6. Your question starts on Line 2, and the
11:43:58 10 answer is on Line 6 by Mr. Brockman.

11:44:06 11 **A.** Yes, I read it.

11:44:07 12 **Q.** So what are you asking Mr. Brockman there in
11:44:11 13 that question?

11:44:11 14 **A.** I don't recall how we got on to this, but it
11:44:18 15 came out that Mr. Brockman, despite the settlement
11:44:21 16 agreement, was still concerned that Mr. Bautista had
11:44:25 17 found another way to get on to the Reynolds DMS.

11:44:32 18 And that he was explaining to me
11:44:34 19 how he thought SIS or Mr. Bautista -- who runs SIS
11:44:39 20 -- how he accomplished that.

11:44:41 21 **Q.** And did you know about that before Mr. Brockman
11:44:44 22 told you?

11:44:44 23 **A.** No, I don't believe so.

11:44:46 24 **Q.** So this was the first time you heard this?

11:44:47 25 **A.** Well, certainly -- if I had heard about it at

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11:44:51 1 all, I hadn't heard about it in this detail.

11:44:53 2 Q. So when you asked Mr. Brockman that question,
11:44:55 3 how did Mr. Brockman respond about what Mr. Bautista
11:45:00 4 had done?

11:45:03 5 A. Apparently, Mr. Bautista had access, or had
11:45:09 6 owned an application that went through the official,
11:45:17 7 authorized portal. RCI is -- yes, RCI was the
11:45:26 8 portal that Reynolds made available to apps that
11:45:31 9 wanted to go through the authorized pipeline to get
11:45:35 10 into the DMS.

11:45:35 11 Apparently Mr. Bautista had done
11:45:39 12 that with one of his applications, and then somehow
11:45:44 13 was able to use that access to then sort of, I
11:45:53 14 guess, continue to do integration for other apps.

11:45:57 15 Q. And Mr. Bautista's use of RCI to gain backdoor
11:46:02 16 access to the Reynolds and Reynolds DMS -- how did
11:46:05 17 Mr. Brockman describe that?

11:46:07 18 A. Well, he --

11:46:08 19 Q. In his answer. In his answer?

11:46:11 20 A. Yeah, well he explained that Mr. Bautista had
11:46:13 21 set up a -- like a separate subsidiary, and through
11:46:22 22 that sort of shielded -- apparently shielded the
11:46:27 23 fact that it was really SIS that was coming in
11:46:30 24 through RCI.

11:46:32 25 Q. But what was the words Mr. Brockman used in his

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11:46:34 1 answer? I'm directing you to Line 6.

11:46:43 2 **A.** Oh, yes. He called it a straw entity.

11:46:46 3 **Q.** And what I want to ask you, Mr. Abrahamsen, did
11:46:48 4 you suggest that term to Mr. Brockman?

11:46:50 5 **A.** No, I don't use that term.

11:46:52 6 **Q.** And then, the overall situation of what
11:46:55 7 Mr. Bautista did in gaining backdoor access to the
11:46:59 8 Reynolds and Reynolds DMS, I want to direct your
11:47:03 9 attention to Line 13. Did Mr. Brockman give you his
11:47:06 10 opinion of what Mr. Bautista had done?

11:47:08 11 **A.** Yeah, we were talking about that one paragraph
11:47:10 12 in the settlement agreement. And he said either the
11:47:15 13 lawyers had missed the point when they -- when they
11:47:21 14 wrote the paragraph, or Mr. Bautista was guilty of
11:47:24 15 fraud and deception.

11:47:26 16 **Q.** And my question to you, Mr. Abrahamsen, is that
11:47:29 17 a term you suggested to Mr. Brockman?

11:47:31 18 **A.** I would not use that term in a hearing.

11:47:34 19 **Q.** And again, were you aware that any of this had
11:47:37 20 happened when you were taking this deposition?

11:47:38 21 **A.** I don't believe so.

11:47:40 22 **Q.** So you learned about it for the first time from
11:47:43 23 Mr. Brockman?

11:47:43 24 **A.** Yes. I -- yes. This paragraph was all news to
11:47:47 25 me.

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11:47:47 1 Q. And about when did this all take place?
11:47:51 2 Keeping in mind, now, in this deposition we're
11:47:53 3 sitting there in September 2018.
11:47:56 4 A. So I think my impression would have been that
11:48:01 5 -- well, it took place after -- we never did find
11:48:04 6 the settlement -- the date of the settlement
11:48:06 7 agreement with SIS, but it's in the document. So it
11:48:09 8 would have been between the time Reynolds settled
11:48:13 9 with SIS, and the day of the investigational hearing
11:48:19 10 -- somewhere in between. So...
11:48:22 11 Q. Let me ask you to turn to two more exchanges I
11:48:26 12 want to ask you about, Page 185 of the deposition.
11:48:38 13 If you can just read that to yourself to refresh
11:48:47 14 your memory. Specifically -- your question is
11:48:49 15 really what I'm going to ask you about, Line 14 to
11:48:52 16 16.
11:49:03 17 A. Yes, I remember.
11:49:04 18 Q. What is it you are asking Mr. Brockman about in
11:49:06 19 these lines?
11:49:07 20 A. There was a reference in this document -- 4459
11:49:13 21 our number -- to something called Syscheck,
11:49:22 22 S-Y-S-C-H-E-C-K, all caps. We were trying to
11:49:25 23 determine whether this was an entity that had been
11:49:28 24 given permission to -- beyond the Reynolds DMS.
11:49:35 25 Q. Did Mr. Brockman give you a satisfactory answer

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11:49:37 1 to your question?

11:49:38 2 **A.** He gave a very lengthy explanation to my
11:49:41 3 question. I did not know what Syscheck was. I kind
11:49:46 4 of misinterpreted the document a little bit, so he
11:49:48 5 gave an answer I wasn't prepared for. Apparently
11:49:51 6 it's a complicated software product that Reynolds
11:49:58 7 developed. He was explaining exactly how it worked.

11:50:04 8 I didn't know computers could do
11:50:05 9 this, but he was explaining that somehow they
11:50:09 10 regulated the amount of data by different offices.
11:50:18 11 DMS has extensive -- it's in every part of the
11:50:20 12 dealership. So his concern was at the end of the
11:50:23 13 month, the finance department would run these great
11:50:25 14 big reports and they would suck a lot of the data
11:50:28 15 capacity out of the computer. So if a customer came
11:50:30 16 in -- it's the same DMS -- and the customer comes in
11:50:32 17 and says, "I want to buy a wiper blade," or a
11:50:36 18 customer says, "Okay. Yes, I want to buy a car.
11:50:40 19 Where do I sign?"

11:50:41 20 If those functions really
11:50:43 21 face-to-face with a customer are lagging because the
11:50:45 22 finance department just at that time happens to be
11:50:49 23 printing out 100-page report, that's not a good
11:50:52 24 thing for Reynolds. So Reynolds developed a
11:50:55 25 software mechanism where they would kind of tell the

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11:50:59 1 printer not to print the 100 pages -- to hold off on
11:51:03 2 that until there was enough computer capacity
11:51:07 3 available to that all of the other parts of the
11:51:09 4 computer software program could run smoothly.

11:51:12 5 Q. That sounds very technical. You lost me about
11:51:17 6 five minutes ago.

11:51:19 7 A. It -- yeah.

11:51:20 8 Q. Did you know this before Mr. Brockman told you?

11:51:23 9 A. No, I didn't even know computers could do that.

11:51:26 10 Q. Did Mr. Brockman -- to the best of your
11:51:28 11 recollection, did Mr. Brockman refer to any notes
11:51:30 12 when he was giving you this answer?

11:51:32 13 A. Oh, no.

11:51:33 14 Q. Did he have --

11:51:34 15 A. He had the e-mail that you -- had the term
11:51:37 16 Syscheck in it, but we didn't know -- that's why we
11:51:40 17 asked the question, because we couldn't tell from
11:51:42 18 the document what Syscheck was.

11:51:43 19 Q. Was there anything in front of Mr. Brockman --
11:51:46 20 notes, manuals that he was referring to when he was
11:51:50 21 giving you this lengthy, detailed, technical answer?

11:51:53 22 A. No.

11:51:53 23 Q. Last question or last exchange I want to ask
11:51:55 24 you about, Mr. Abrahamsen, is on Page 189. And
11:52:03 25 Line 1, you ask Mr. Brockman about something called

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11:52:05 1 StoneEagle. If we can put Exhibit 4420 also up on
11:52:11 2 the screen -- actually 4420 up on the screen that
11:52:14 3 would be fine. That's what Mr. Abrahamsen was
11:52:17 4 asking Mr. Brockman about. That's Exhibit 4420 to
11:52:40 5 your deposition?

11:52:40 6 **A.** Yeah, I don't know where -- it's tiny. I don't
11:52:46 7 know where StoneEagle is on the exhibit, but
11:52:50 8 anyway...

11:52:50 9 **Q.** My question is what is StoneEagle?

11:52:52 10 **A.** StoneEagle is an integrator.

11:52:55 11 **Q.** Another computer company that accesses the
11:52:58 12 Reynolds and Reynolds DMS?

11:52:58 13 **A.** Yes.

11:53:00 14 **Q.** Did you know about StoneEagle before you asked
11:53:03 15 Mr. Brockman what it was?

11:53:04 16 **A.** Yeah, I knew -- yeah, I knew who they were.

11:53:08 17 **Q.** And did -- when was the StoneEagle -- well, let
11:53:12 18 me rephrase that. The time period you are asking
11:53:16 19 Mr. Brockman about -- I think it's on the exhibit,
11:53:18 20 what is that time period regarding StoneEagle?

11:53:21 21 **A.** Yeah, if we can get the date -- yeah, good.

11:53:26 22 Thanks okay. This is an e-mail from Mr. Schaefer to
11:53:31 23 Mr. Brockman dated November 1, 2016.

11:53:35 24 **Q.** And what was your question -- what was the
11:53:39 25 purpose of your inquiry about StoneEagle?

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11:53:42 1 **A.** The question -- we were trying to get a better
11:53:47 2 understanding of whether a company -- an integrator
11:53:49 3 had received permission from Reynolds to be on the
11:53:52 4 DMS.

11:53:53 5 **Q.** And did Mr. Brockman -- at least to your
11:53:57 6 observation -- appear to recall the incident about
11:54:03 7 StoneEagle?

11:54:04 8 **A.** Yes, he knew about StoneEagle.

11:54:07 9 **Q.** Did he give you a satisfactory answer?

11:54:09 10 **A.** Yes.

11:54:12 11 **Q.** Overall, Mr. Abrahamsen, in the two days of
11:54:21 12 depositions, were you satisfied with the answers you
11:54:23 13 got from Mr. Brockman?

11:54:25 14 **A.** Yes.

11:54:25 15 **Q.** Obviously technical software issues. Did
11:54:28 16 Mr. Brockman appear to you to have any problem
11:54:31 17 handling these difficult, technical question?

11:54:34 18 **A.** No.

11:54:34 19 **Q.** Did he appear to you -- and some of these
11:54:38 20 questions, and we've seen the e-mails you showed him
11:54:41 21 go back to 2014 or 2012?

11:54:43 22 **A.** Yes.

11:54:44 23 **Q.** When you were asking him these questions, did
11:54:47 24 it appear to you that Mr. Brockman had any problem
11:54:48 25 recalling these historical facts?

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11:54:50 1 **A.** No, he had good command of the facts.

11:54:52 2 **Q.** And did -- I mean, I asked you once about the
11:54:57 3 one question if he had notes or manuals in front of
11:54:59 4 him. During the entire deposition for two days, did
11:55:03 5 Mr. Brockman refer to notes, manuals, books or
11:55:05 6 anything like that to answer your questions?

11:55:07 7 **A.** No, the only documents that would be in front
11:55:10 8 of the witness would be exhibits that I showed him.

11:55:14 9 **Q.** And during the course of this deposition, were
11:55:18 10 there things that you asked Mr. Brockman about that
11:55:21 11 you didn't know about?

11:55:22 12 **A.** Oh, yeah.

11:55:23 13 **Q.** And did Mr. Brockman relay those historical
11:55:25 14 facts to you to your satisfaction?

11:55:28 15 **A.** Yes.

11:55:30 16 **Q.** How long have you been with the FTC?

11:55:33 17 **A.** I started in 1980.

11:55:35 18 **Q.** So more than a few years?

11:55:38 19 **A.** Thank you for your generous characterization.

11:55:40 20 **Q.** How many times -- how many times have you
11:55:44 21 deposited people in FTC depositions -- how many
11:55:48 22 depositions have you done?

11:55:49 23 **A.** I have no idea.

11:55:50 24 **Q.** More than a hundred?

11:55:52 25 **A.** I'm not sure it's more than 100, but I've been

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11:55:56 1 doing them -- you know, I've been in this position
11:55:59 2 I'm in now for about 35 years. So it's normal
11:56:02 3 course of our practice.

11:56:03 4 Q. Well, I want you to sit there right now,
11:56:06 5 Mr. Abrahamsen, and recall the deposition you did on
11:56:08 6 Mr. Brockman and compare it in your mind to all of
11:56:11 7 the other people that you have deposed. In your
11:56:15 8 opinion, how would you rank Mr. Brockman compared to
11:56:19 9 those other deponents?

11:56:20 10 A. Yeah, he was a good witness. He was
11:56:24 11 forthcoming. Sometimes witnesses just aren't. I
11:56:26 12 mean, for whatever reason they just -- they're just
11:56:29 13 sort of a dud, but he was informative.

11:56:32 14 Q. Can I use the word evasive?

11:56:34 15 A. Well, that's a different issue. I mean, that's
11:56:38 16 -- now you are going into somebody's intent. We
11:56:42 17 never know whether they're saying, "I don't
11:56:44 18 remember," because they don't remember or they're
11:56:47 19 being evasive. So that's --

11:56:49 20 Q. I'm sorry, I didn't mean to cut you off.

11:56:50 21 A. I'm done.

11:56:51 22 Q. My question is was Mr. Brockman evasive?

11:56:54 23 A. I didn't think he was.

11:56:56 24 MR. COREY SMITH: Thank you. No
11:56:57 25 further questions, Your Honor.

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11:56:57 1 THE COURT: Okay. Cross?

11:56:57 2 CROSS-EXAMINATION

11:56:57 3 BY MS. BLEUSTEIN:

11:57:06 4 Q. Good morning, Mr. Abrahamsen.

11:57:08 5 A. Good morning.

11:57:09 6 Q. Now, you are not a medical doctor?

11:57:11 7 A. No, that's correct.

11:57:12 8 Q. In fact, you are a lawyer?

11:57:15 9 A. That's also correct.

11:57:16 10 Q. So you don't have any medical training in
11:57:18 11 diagnosing cognitive issues?

11:57:20 12 A. No.

11:57:20 13 Q. Or in recognizing the symptoms of Alzheimer's
11:57:23 14 disease?

11:57:24 15 A. No.

11:57:24 16 Q. Parkinson's disease?

11:57:25 17 A. No.

11:57:26 18 Q. Or dementia?

11:57:27 19 A. No.

11:57:27 20 Q. During your deposition of Mr. Brockman, you
11:57:33 21 asked him about topics related to UCS and Reynolds?

11:57:36 22 A. Yes.

11:57:37 23 Q. UCS, the company that he founded and built from
11:57:42 24 the ground up; right?

11:57:43 25 A. Yes.

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11:57:44 1 Q. The company that he ran for decades?

11:57:45 2 A. Right.

11:57:47 3 Q. To you, did Mr. Brockman seem passionate about
11:57:50 4 the company?

11:57:50 5 A. I think that's a fair characterization.

11:57:53 6 Q. Um, so you deposed Mr. Brockman -- or I believe
11:57:56 7 you referred to it as an investigational hearing?

11:57:58 8 A. You are correct.

11:57:59 9 Q. Yeah. So that was September 18th and 19th of
11:58:03 10 2019?

11:58:05 11 A. Correct.

11:58:05 12 Q. But the deposition didn't last the entire day
11:58:09 13 on either of those days; did it?

11:58:11 14 A. Correct.

11:58:11 15 Q. It was about four hours the first day?

11:58:13 16 A. I think my recollection was they went about
11:58:16 17 9:00 to 1:00.

11:58:17 18 Q. Okay. Okay. When you met Mr. Brockman during
11:58:21 19 the deposition in 2019, did he seem physically fit
11:58:24 20 to you?

11:58:25 21 A. He was -- physically -- I would characterize a
11:58:30 22 little frail. When he walked, I remember a little
11:58:33 23 stooped over.

11:58:35 24 Q. Did he need assistance to stand up or sit down?

11:58:38 25 A. No.

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11:58:39 1 Q. Okay. And did he need any assistance walking
11:58:42 2 in and out of the room?

11:58:43 3 A. No, and he didn't have a cane or anything like
11:58:46 4 that.

11:58:46 5 Q. Okay. Okay. Now, throughout your deposition,
11:58:48 6 he was providing you with details of Reynolds's
11:58:52 7 history; is that right?

11:58:53 8 A. Among other topics we touched on.

11:58:55 9 Q. Okay. And you testified that he was
11:58:57 10 forthcoming with his answers?

11:58:59 11 A. Yeah, I would say so.

11:59:01 12 Q. He wasn't feigning memory impairment at any
11:59:05 13 point during the deposition?

11:59:05 14 A. I don't believe so.

11:59:07 15 Q. And he knew you were a lawyer for the
11:59:09 16 government?

11:59:09 17 A. Oh, yeah.

11:59:13 18 Q. You never interacted with Mr. Brockman before
11:59:15 19 the deposition?

11:59:16 20 A. Correct.

11:59:16 21 Q. And you said the deposition was September of
11:59:19 22 2019?

11:59:20 23 A. Correct.

11:59:21 24 Q. So that's over two years ago now; right?

11:59:23 25 A. Right.

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11:59:25 1 Q. And you haven't seen Mr. Brockman in person
11:59:27 2 since then?

11:59:28 3 A. Correct.

11:59:29 4 Q. And also, just to be clear, you haven't
11:59:32 5 communicated with him in any way by phone, e-mail
11:59:34 6 since then?

11:59:36 7 A. No. I mean, to the extent any communications
11:59:41 8 would be through lawyers.

11:59:42 9 Q. Lawyers. So other than what you can see by
11:59:45 10 looking at Mr. Brockman sitting here today, you have
11:59:48 11 no firsthand knowledge of his current physical
11:59:51 12 condition?

11:59:51 13 A. Correct.

11:59:51 14 Q. And you have no firsthand knowledge of his
11:59:54 15 current cognitive condition?

11:59:55 16 A. Correct.

11:59:55 17 Q. And you have no firsthand knowledge of how
11:59:58 18 Mr. Brockman has declined cognitively since 2019?

12:00:01 19 A. I would -- I have no idea.

12:00:04 20 Q. So you have no idea whether Mr. Brockman is
12:00:06 21 presently competent to stand trial?

12:00:08 22 A. Oh, I have no idea.

12:00:11 23 MS. BLEUSTEIN: No further questions.

12:00:12 24 Thank you.

12:00:12 25 THE COURT: Thank you, ma'am. Anything

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12:00:14 1 further?

12:00:14 2 MR. COREY SMITH: No questions, Your
12:00:15 3 Honor.

12:00:15 4 THE COURT: Okay. May this witness be
12:00:16 5 excused?

12:00:17 6 MR. COREY SMITH: Yes, Your Honor.

12:00:20 7 THE COURT: Thank you for your time,
12:00:21 8 sir. You are excused.

12:00:23 9 THE WITNESS: Thank you for that.

12:00:26 10 THE COURT: Counsel, we'll take our
12:00:28 11 lunch break at this time. If we can all be back at
12:00:31 12 one o'clock, we'll continue on into the evening.

13 (WHEREUPON, THE PROCEEDINGS WERE RECESSED AT 12:00
14 P.M.)
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SEAN W. GUMM, CSR #13168, RPR, CRR

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I hereby certify that pursuant to Title 28,
Section 753 United States Code, the foregoing is a
true and correct transcript of the stenographically
reported proceedings in the above matter.

Certified on 11/18/2021.


Sean Gumm, RPR, CRR

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